

1994

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### Recommended Citation

Maria L. Sepulveda, *Barring Extraterritorial Protection for Haitian Refugees Interdicted on the High Seas: Sale v. Haitian Centers Council, Inc.*, 44 Cath. U. L. Rev. 321 (1995).

Available at: <https://scholarship.law.edu/lawreview/vol44/iss1/13>

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## NOTE

### BARRING EXTRATERRITORIAL PROTECTION FOR HAITIAN REFUGEES INTERDICTED ON THE HIGH SEAS: *SALE V. HAITIAN CENTERS COUNCIL, INC.*

"'Give me your tired, your poor, [y]our huddled masses yearning to breathe free, [t]he wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!'"<sup>1</sup>

Although this axiom is often used to describe the United States immigration policy,<sup>2</sup> United States immigration laws have traditionally limited the spirit of this clause.<sup>3</sup> The belief that the admission of immigrants into

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1. Emma Lazarus, *The New Colossus*, in 2 THE HEATH ANTHOLOGY OF AMERICAN LITERATURE 28 (Paul Lauter et al. eds., 1990).

2. See Act of July 27, 1868, ch. 249, 15 Stat. 223, 223 (concerning rights of American citizens in foreign states). This Act declared that "the right of expatriation is a natural and inherent right of all people . . . [and in] recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship." *Id.*; see *Ex parte Kurth*, 28 F. Supp. 258, 263 (S.D. Cal.) (explaining that until 1921, the United States immigration policy provided for "unrestricted admission for anyone who sought its shores"), *appeal dismissed*, 106 F.2d 1003 (9th Cir. 1939); S. REP. NO. 256, 96th Cong., 1st Sess. 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141 (asserting that one of the oldest themes in United States history is "welcoming homeless refugees to our shores"); see also AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-2 (1992) (explaining that immigration into the United States was virtually unrestricted until 1875 when Congress enacted a series of restrictive immigration laws); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987) (explaining that prior to the Civil War, the United States received immigrants from all nations, in furtherance of the principle followed by Congress that a "natural right" exists for all "human beings to expatriate themselves"); *infra* note 3.

3. See, e.g., Act of May 19, 1921, ch. 8, 42 Stat. 5 (enacting a law that established quotas for immigration based on nationality); *Kurth*, 28 F. Supp. at 263 (listing historical restrictions for specific groups of aliens seeking entry into the United States, including convicts and prostitutes (1875), Chinese (1882), mentally ill and aliens likely to become public charges (1882), contract laborers (1885), polygamists (1891), anarchists (1903), and illiterates (1917)); see also RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1.01 (2d ed. 1993) (describing the evolution of United States immigration law from few restrictions to extensive qualitative restrictions, "including ethnic ones, and eventually to quantitative restrictions"); RUTH E. WASEM, ASYLUM SEEKERS: HAITIANS IN COMPARATIVE CONTEXT 4,

the United States exacerbates economic and social problems has brought about restrictive United States immigration policies.<sup>4</sup> Unfortunately, these considerations have caused the United States to send refugees<sup>5</sup> back to countries where they face torture, imprisonment, or murder because of their skin color, political affiliation, or religious beliefs.<sup>6</sup>

7-8 (Congressional Research Service Report for Congress, No. 93-233 EPW, 1993). Wasem explains that the Immigration and Naturalization Service will not grant asylum if it determines that the migrant seeks refuge in the United States for economic betterment, rather than social or political reasons. *Id.* at 4. Approximately one-half of one percent of the world's refugees apply for political asylum in the United States. *Id.* at 6-7.

4. LARRY M. EIG ET. AL., IMMIGRATION: ILLEGAL ENTRY AND ASYLUM ISSUES 1 (Congressional Research Service Issue Brief No. IB93095, 1993) (noting increased public concern regarding immigration as a result of terrorist activities in the United States, such as the Central Intelligence Agency shootings in Langley, Virginia on January 25, 1993, the bombing of the World Trade Center on February 26, 1993, and other terrorist plans aimed at New York City); *see* STEEL, *supra* note 3, § 1.01 (suggesting that xenophobia influenced Congress when it passed a significantly restrictive immigration act in 1917); Henkin, *supra* note 2, at 855 (explaining that "unemployment, economic depression, and growing 'nativism,' racism, and xenophobia led to the" first exclusion acts); *see also* Dick Kirschten, *Catch-up Ball*, 25 NAT'L J. 1976, 1976 (1993) (reporting a United States poll that revealed a widespread sentiment that immigrants take jobs and scholarships from United States citizens); *id.* at 1978 (quoting President Clinton who commented that the United States cannot afford to assume the financial burdens of new immigrants "when we are not adequately providing for the jobs, the health care and education of our own people"); Richard L. Berke, *Politicians Discovering An Issue: Immigration*, N.Y. TIMES, Mar. 8, 1994, at A19 (explaining that politicians are encouraged by polls showing that many voters increasingly are concerned about the impact of immigrants on the United States economy and culture); Robert D. McFadden, *Immigration Hurts City, New Yorkers Say in Poll*, N.Y. TIMES, Oct. 18, 1993, at B4 (polls show that many New Yorkers believe the trade center bombing would not have happened if immigration controls had been tighter).

5. A refugee is defined as

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (1988); *see* United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268. Article I of the Protocol incorporates by reference the meaning of "refugee" as it was defined by the Convention relating to the Status of Refugees ratified in Geneva on July 28, 1951. *Id.* at 6225 n.1. Thus, under Article I of the Protocol, "refugee" means any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 150, 152.

6. *See* Brief of *Amici Curiae* American Jewish Committee and Anti-Defamation League in Support of Respondents at 9, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549

The Naturalization Clause of the United States Constitution authorizes Congress to "establish an uniform Rule of Naturalization."<sup>7</sup> The Supreme Court has held that federal power over migration is implicit in the Constitution as an incident of sovereignty and foreign policy.<sup>8</sup> Congress, however, imposes statutory limitations on the federal power to regulate immigration to protect persons who are fleeing persecution in their native countries.<sup>9</sup>

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(1993) (No. 92-344) [hereinafter Brief of American Jewish Committee] (referring to the story of the S.S. *St. Louis*). In a tragic incident in 1939, President Roosevelt denied United States admission to hundreds of Jews who sought escape from Germany. *Id.* Consequently, many of those who returned to Europe became victims of Hitler's genocide of millions of Jews in Nazi Germany in the 1940s. *Id.*; see also J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 423-24 (1992). Cavosie relates the story of when a United States Coast Guard cutter denied a Lithuanian sailor's request for asylum despite considerable evidence that he had been persecuted and feared future persecution. *Id.* Upon return to his Soviet ship, he allegedly was beaten unconscious. *Id.*

7. U.S. CONST. art. I, § 8, cl. 4.

8. The Supreme Court has cited various constitutional provisions as grants of power to Congress to regulate immigration: power to limit the migration and importation of "[s]uch Persons as any of the States now existing shall think proper to admit," U.S. CONST. art. I, § 9, cl. 1; power to declare war, *id.* § 7, cl. 11; power to regulate foreign commerce; *id.* § 7, cl. 3; and power to make all necessary and proper laws, *id.* § 7, cl. 18; see, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936) (finding an inherent power of the federal government to regulate foreign affairs); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (holding that "[t]he right to exclude or to expel all aliens [is] . . . an inherent and inalienable right of every sovereign and independent nation"); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (finding that the power to exclude aliens is "an incident of sovereignty"); cf. 50 U.S.C. § 21 (1988) (giving the President authority to apprehend, restrain, secure, and remove alien enemies during times of war). Furthermore, in *Toll v. Moreno*, 458 U.S. 1 (1982), the Supreme Court held that states do not have the power to burden resident aliens based on their alienage. *Id.* at 11.

9. See *infra* notes 10-15, 18-27 and accompanying text (detailing various enactments that admit refugees, who otherwise would be persecuted in their native country, into the United States). For definitions of persecution, see *Dunat v. Hurney*, 297 F.2d 744, 746 (3d Cir. 1961) (explaining that "'persecution' " includes confinement and torture or severe economic deprivation constituting a threat to life or freedom); *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (defining "'persecution' " as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive").

Early refugee legislation<sup>10</sup> covered narrowly-defined classes of refugees<sup>11</sup> and provided limited relief for persons susceptible to persecution.<sup>12</sup> Congress first recognized the need to address the issue of refugee immigration by enacting the Displaced Persons Act of 1948, which resolved immediate refugee crises on a country-by-country basis.<sup>13</sup> In 1965, Congress enacted a permanent mechanism for admitting some refugees by providing for the admission of aliens who were fleeing persecution from Communist or Middle Eastern countries.<sup>14</sup> These acts, however,

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10. See Refugee Relief Act of 1953, ch. 336, § 6, 67 Stat. 400, 403 (omitted due to termination of the issuance of immigration visas under this Act on December 31, 1956, as provided by the Act) (providing that an alien who proves that he lawfully entered the United States and that he cannot return to his native country because of persecution on account of race, religion, or political opinion may, upon application for permanent residence, be granted immigrant visas); Act of June 16, 1950, ch. 262, 64 Stat. 219 (repealed by Act of September 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 654, 655) (amending the Displaced Persons Act of 1948 by defining persecution and extending admission to refugees from additional countries); Displaced Persons Act of 1948, ch. 647, § 2(d), 62 Stat. 1009, 1010 (repealed by Act of September 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 654, 655) (authorizing, for a limited period of time, the admission of natives of Czechoslovakia and other European countries who "fled as a direct result of persecution or fear of persecution from [those] countr[ies]").

11. See Displaced Persons Act of 1948, § 4, 62 Stat. at 1011. This Act allowed Congress to grant permanent residence status to displaced persons residing in the United States. *Id.* "Displaced persons" included persons who were "displaced from the countr[ies] of [their] birth, or nationality, or of [their] last residence as a result of events subsequent to the out-break of World War II" and could not return for fear of persecution. *Id.* The Act only permitted 15,000 displaced persons per session of Congress to become permanent residents. *Id.*; see also Refugee Relief Act of 1953, § 4, 67 Stat. at 401 (providing immigrant visas to a specified number of refugees from each European country).

12. See Refugee Relief Act of 1953, § 4, 67 Stat. at 401 (providing admission for specified refugees); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 56 (3d ed. 1992); WASEM, *supra* note 3, at 15 (explaining that since 1946, the United States admitted 2.6 million immigrants for humanitarian reasons and noting the varying trends of regions from which refugees come). The Immigration and Nationality Act of 1952 merely gave the Attorney General the authority to parole aliens into the United States under emergency conditions. KURZBAN, *supra*, at 56; 1 1992-93 IMMIGRATION AND NATIONALITY LAW HANDBOOK 369 (R. Patrick Murphy et al. eds., 1992). The law permits an alien with "parole" status to be physically present within the United States for a particular reason without being detained by the Immigration and Naturalization Service. *Id.* A paroled alien is not legally admitted into the United States and is subject to exclusion from the United States. *Id.* Thus, the Immigration and Nationality Act of 1952 did not guarantee that an alien would not be returned to a country where she might be persecuted. *Id.*; see also STEEL, *supra* note 3, § 8.01(1)-(5) (listing the limited legal protections available to refugees prior to the Refugee Act of 1980, including: conditional entry based upon various factors, temporary withholding of deportation, and ad-hoc legislation addressing refugees from specific countries).

13. Displaced Persons Act of 1948, § 2, 62 Stat. at 1009 (offering protection to refugees from specific European countries).

14. Act of October 3, 1965, Pub. L. No. 89-236, sec. 3, § 203(a), 79 Stat. 911, 912-14 (current version codified at 8 U.S.C. § 1153 (1988)) (providing for admission of refugees as conditional entrants who could gain permanent residence with special procedures); see

failed to provide comprehensive standards or procedures for considering refugee claims.<sup>15</sup>

On November 1, 1968, the United States took a significant step in defining its refugee policy by acceding to the United Nations Protocol Relating to the Status of Refugees (Protocol).<sup>16</sup> Article 33 of the Protocol prohibits signatories from returning aliens to countries where their lives or individual freedoms might be threatened.<sup>17</sup> Congress incorporated the humanitarian spirit of Article 33 in section 243(h)(1) of the Immigration and Nationality Act (INA).<sup>18</sup> This section gives the Attorney General discretion to withhold the deportation of any alien within the United States to a country where that alien would be physically persecuted on the basis of her race, religion, or political opinion.<sup>19</sup>

Finally, in the Refugee Act of 1980,<sup>20</sup> Congress passed comprehensive refugee legislation that established greater protections and benefits for

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FRAGOMEN & BELL, *supra* note 2, at 6-4 (explaining that few refugees were admitted under this legislation due to its limited coverage).

15. See S. REP. NO. 256, *supra* note 2, at 4, reprinted in 1980 U.S.C.C.A.N. at 144. Ambassador Dick Clark explained that prior to the enactment of the Refugee Act of 1980, United States refugee policy was "a patchwork of different programs that evolved in response to specific crises." *Id.*; STEEL, *supra* note 3, § 8.01(5) (explaining that because early refugee acts only addressed refugee crises on an ad-hoc basis, special legislation had to be enacted each time a refugee crisis arose in a specific country).

16. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol] (incorporating Article 33 of the 1951 Convention relating to the Status of Refugees).

17. See Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150, 176. Article 33 of the Convention provides that:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

*Id.*

18. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h)(1) (1988)); see Suzanne Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865, 866 n.5 (1993) (noting that the United States confirmed its commitment to observe the non-refoulement policy of the Protocol by enacting section 243(h) of the INA).

19. 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993). As originally enacted, section 243(h)(1) "with[held] deportation of any alien within the United States to any country in which . . . the alien would be subject to physical persecution." § 243(h), 66 Stat. 163, 214.

20. Refugee Act of 1980, Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)).

refugees.<sup>21</sup> The Refugee Act of 1980 amended section 243(h)(1) of the INA.<sup>22</sup> As amended by the Refugee Act of 1980, section 243(h)(1) prohibits the Attorney General from deporting or returning any person to a country where she may be persecuted on the basis of her race, religion, or political affiliation.<sup>23</sup> Before its amendment in 1980, section 243(h)(1) explicitly stated that the Attorney General could withhold the deportation of an alien *only* if she is "within the United States."<sup>24</sup> Congress deleted this explicit territorial restriction in the Refugee Act of 1980.<sup>25</sup> The United States District Court for the Eastern District of New York addressed the issue of extraterritorial application of section 243(h)(1) in a case regarding the United States policy of interdicting<sup>26</sup> Haitian immigrants on the high seas and summarily returning them to Haiti.<sup>27</sup>

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21. S. REP. NO. 256, *supra* note 2, at 1, *reprinted in* 1980 U.S.C.C.A.N. at 141-42 (explaining that the objectives of the Refugee Act of 1980 are to provide a nondiscriminatory and systematic procedure for admitting refugees of special humanitarian concern to the United States and to provide effective resettlement and absorption programs for refugees who are admitted). The Senate Report explains that the purpose of the Refugee Act of 1980 is to give "statutory meaning to our national commitment to human rights and humanitarian concerns." *Id.* at 1, *reprinted in* 1980 U.S.C.C.A.N. at 141; *see also* Final Rule, 46 Fed. Reg. 45,116 (1981) (to be codified at 8 C.F.R. pts. 108, 207, 209) (acknowledging that the Refugee Act of 1980 establishes uniform procedures to meet "humanitarian needs of refugees"); FRAGOMEN & BELL, *supra* note 2, at 6-5 (noting that the Refugee Act of 1980 established detailed procedures for choosing, admitting, and granting permanent resident status to refugees).

22. Immigration and Nationality Act of 1952, § 243(h), 66 Stat. at 214, *amended by* Refugee Act of 1980, § 203(e), Pub. L. No. 96-212, 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. V 1993)).

23. 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993). Section 243(h)(1) currently provides that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country." *Id.*

24. *See supra* note 19 (setting forth text of section 243(h)(1) prior to its amendment by the Refugee Act of 1980).

25. *Compare supra* note 19 (providing the text of section 243(h)(1) before Congress amended it by the Refugee Act of 1980) *with supra* note 23 (providing the text of section 243(h)(1) after its amendment).

26. "Interdiction" under the United States Alien Migration Interdiction Operation includes boarding Haitian-flagged vessels on the high seas to investigate the condition and destination of the vessel and the status of the vessel's passengers. Haitian Council Ctrs., Inc. v. Sale, 823 F. Supp. 1028, 1030 (E.D.N.Y. 1993).

27. *Id.* The issue of extraterritorial application has primarily arisen with respect to Haiti because Haiti is the only foreign nation with which the United States has an interdiction agreement. *See* WASEM, *supra* note 3, at 11. Wasem explains that the Coast Guard brings Cubans who are intercepted on the high seas to the United States without delay. *Id.* *But see* EIG, *supra* note 4, at 7 (discussing the recent increase in interdiction of aliens from the People's Republic of China and the Dominican Republic).

Between 1972 and 1980, nearly 30,000 Haitians sailed toward Florida to escape economic and political oppression in Haiti.<sup>28</sup> In the spring of 1980, 125,000 Cubans were transported to the United States in the *Marief* boatlift.<sup>29</sup> In an effort to limit the influx of immigrants, President Reagan issued Executive Order No. 12,324<sup>30</sup> in 1981, which commanded the Secretary of State to enter agreements with foreign governments to prevent illegal immigration to the United States.<sup>31</sup> Pursuant to this Order, the Secretary of State entered an agreement with Haiti that permitted United States Coast Guard officials to board Haitian vessels on the high seas to prevent illegal transportation of Haitians to the United States.<sup>32</sup> The agreement provided that Coast Guard officials would not return any passenger who would be subject to persecution in Haiti.<sup>33</sup>

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28. See Margot Hornblower, *Haitians Facing Eviction*, WASH. POST, May 9, 1980, at A1 (reporting that between 15,000 and 30,000 Haitian refugees fled to Florida between 1972 and May 1980).

29. Jeffrey C. Gilbert & Steven Kass, Comment, *Jean v. Nelson: A Stark Pattern of Discrimination*, 36 U. MIAMI L. REV. 1005, 1006-07 & n.11 (1982) (explaining that in April of 1980, the *Marief* boatlift began when boats from South Florida sailed to Cuba's Mariel Harbor to bring Cuban refugees to the United States).

30. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 (1988).

31. *Id.*; see Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C. § 1182 (1988) (explaining that President Reagan issued the Proclamation after determining that uncontrolled immigration of undocumented aliens was "a serious national problem detrimental to the interests of the United States").

32. Interdiction Agreement Between the United States of America and Haiti, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3559-60. The agreement provided that:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

....

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

*Id.*

33. *Id.* at 3560. The Agreement set forth that "[i]t is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." *Id.* Between 1981 and 1990, U.S. officials allowed less than one dozen of the 22,651 Hai-



On September 30, 1991, members of the Haitian military overthrew the democratically elected government of President Jean-Bertrand Aristide.<sup>34</sup> The Haitian military murdered, tortured, imprisoned, and destroyed the property of hundreds of Aristide supporters.<sup>35</sup> Soon thereafter, thousands of Haitians sought to escape Haiti on shoddy boats captained by inexperienced navigators.<sup>36</sup> In an effort to thwart another flood of Haitian immigrants into the United States, the Coast Guard continued its repatriation policy.<sup>37</sup> Because the Coast Guard could not safely conduct screening proceedings to determine whether the Haitian passengers were entitled to asylum in the United States aboard Coast Guard cutters, the Department of Defense established temporary screening facilities at the United States Naval Base in Guantanamo, Cuba.<sup>38</sup> Many

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tians interdicted at sea to apply for asylum in the United States. MAUREEN TAFT-MORALES & MARK P. SULLIVAN, *HAITI: THE STRUGGLE FOR DEMOCRACY AND CONGRESSIONAL CONCERNS IN 1993*, at 9 (Congressional Research Service Issue Brief No. IB93036, 1993). The United States Government deemed the rest to be fleeing Haiti solely for economic reasons. *Id.* Between 1972 and 1980, the United States granted asylum to only 58 of the 5,795 Haitians who requested asylum on grounds that the remaining applicants came only for economic reasons. Shula Beyer, *Hungry, Homeless Haitians Continue to Pour Into Florida*, WASH. POST, Jan. 13, 1980, at A7.

34. Gluck, *supra* note 18, at 866 n.5 (recounting the brutal military coup of Jean-Bertrand Aristide, Haiti's first leader to be democratically elected in 200 years). The military ousted Haiti's first freely elected president after seven months of democracy. *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1. Brigadier General Raul Cedras announced that the military had assumed control. *Id.*

35. See TAFT-MORALES & SULLIVAN, *supra* note 33, at 7-8. The Department of State reported "that throughout 1992 Haitians suffered frequent human rights abuses 'including extrajudicial killings by security forces, disappearances, beatings, and other mistreatment of detainees and prisoners, arbitrary arrest and detention, and executive interference with the judicial process.'" *Id.* at 8. The Lawyers Committee for Human Rights reported that "'the military [ ] executed, tortured and illegally arrested countless Haitians.'" *Id.* The Haitian military and its civilian allies unleashed a terror campaign to eliminate support for Aristide. *Foes of Aristide Reported to Kill 70 in Haiti*, N.Y. TIMES, Mar. 17, 1994, at A6. Their tactics included cutting off Aristide supporters' faces to make identification difficult and dismembering bodies and leaving them in the streets to be consumed by pigs. *Id.* Anyone daring to grieve or remove these bodies would be targeted for retaliation. *Id.*; *Cardinal Urges U.S. to Welcome Haitians*, N.Y. TIMES, Dec. 23, 1991, at B6 (reporting that less than two months after the overthrow of Aristide, thousands of Haitians were killed).

36. Maya Bell, *U.S. Moves to Stop Haitians; Planes, Ships to Form Cordon Around Nation*, ORLANDO SENTINEL TRIB., Jan. 16, 1993, at A1. The Coast Guard intercepted over 40,000 Haitians after the September 1991 coup. *Id.* at A6.

37. Frank Trejo, *U.S. Draws Fire Over Refugees*, DALL. MORN. NEWS, Nov. 2, 1992, at 1A, 16A (explaining that when the surge of Haitian immigrants sailed to the United States after the coup, the Coast Guard initially continued to intercept Haitians pursuant to President Reagan's executive order).

38. *Id.* Interviews conducted aboard the cutters resulted in screening out and repatriating passengers who the Coast Guard identified as economic migrants, and screening in and transporting to the United States those passengers who made credible claims as polit-

Haitians drowned while attempting to escape from Haiti on unsafe vessels and the Guantanamo camps quickly became overcrowded.<sup>39</sup>

Citing the inadequate legal representation of Haitian immigrants and the health risks posed by overcrowding at Guantanamo, the Haitian Centers Council, Inc. (Haitian Centers)<sup>40</sup> sued the Commissioner of the Immigration and Naturalization Service (INS) in the United States District Court for the Eastern District of New York.<sup>41</sup> The Haitian Centers alleged that the Coast Guard violated their First Amendment rights.<sup>42</sup> Although the district court ordered the INS to provide Haitians at Guantanamo access to legal representation for screening proceedings,<sup>43</sup> the United States Supreme Court subsequently stayed the district court's order.<sup>44</sup>

While the Supreme Court considered the Haitian Centers' appeal of the stay, President Bush issued Executive Order No. 12,807—better known as the Kennebunkport Order<sup>45</sup>—in response to deteriorating con-

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ical refugees. *Id.*; see also TAFT-MORALES & SULLIVAN, *supra* note 33, at 9 (noting that the Coast Guard allowed only 30% of those screened to enter the United States).

39. Trejo, *supra* note 37, at 1A, 16A (reporting that within months after the United States opened the Guantanamo Bay naval base for refugee processing, it was filled to capacity); see also WASEM, *supra* note 3, at 2-3 (disclosing that in January 1993, 400 Haitians drowned en route to Florida). The Haitian service organizations claimed that the INS violated the organizations' First Amendment rights of freedom of association by denying them the opportunity to provide Haitian refugees with legal representation. *Haitian Ctrs. Council, Inc. v. McNary*, 823 F. Supp. 1028, 1040 (E.D.N.Y. 1993). One Haitian who was detained at Guantanamo described the conditions at the naval base: thousands of Haitians fought each other to get food; when people attempted to cut in front of others in the meal line, the military beat them; the toilets were filled to the top; rats, snakes, and scorpions ran about the camp; and the food and milk were sometimes filled with worms. *Surviving on Toussaint and a Prayer*, *NEWSDAY*, July 22, 1993, at 101. When the detainees protested these conditions, military officials handcuffed them and sent them to prison. *Id.* The military held HIV-positive Haitians who had plausible claims for political asylum for 20 months at the Guantanamo base. *Out of a Refugee Hell*, *SACRAMENTO BEE*, June 11, 1993, at B6. They were admitted only after they developed full-blown AIDS and needed hospitalization. *Id.* Some physicians who visited the camp described the camp "as 'a medical and public health outrage.'" *Id.*

40. *Sale*, 823 F. Supp. at 1028 (noting that the Haitian Centers Council includes various organizations that represent Haitians who were intercepted on the high seas and detained at Guantanamo).

41. *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541 (E.D.N.Y. 1992).

42. *Id.* at 542.

43. *Id.* at 548.

44. *McNary v. Haitian Ctrs. Council, Inc.*, 112 S. Ct. 1714, 1714 (1992). Justice Thomas granted the application for a stay of the preliminary injunction entered by the United States District Court for the Eastern District of New York pending the decision of the United States Court of Appeals for the Second Circuit. *Id.*

45. Exec. Order No. 12,807, 3 C.F.R. 303 (1992). The Kennebunkport Order reads: By the authority vested in me as President by the Constitution and the laws of the United States of America, . . . and whereas:

ditions at Guantanamo Naval Base.<sup>46</sup> The Order commanded the Coast Guard to intercept vessels that were illegally transporting passengers from Haiti to the United States and to return the passengers to Haiti summarily without determining their refugee status.<sup>47</sup> The Haitian Centers sought to enjoin implementation of the Kennebunkport Order in the United States District Court for the Eastern District of New York.<sup>48</sup> The district court denied the injunction, ruling that section 243(h)(1) of the Refugee Act and Article 33 of the Protocol do not provide relief for Haitian aliens on the high seas.<sup>49</sup> On appeal, the United States Court of Appeals for the Second Circuit overruled the district court, holding that section 243(h)(1) protects aliens in international waters.<sup>50</sup>

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(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, . . . and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

....

I, GEORGE BUSH, President of the United States of America, hereby order [the Secretary of State to direct the Coast Guard] as follows:

....

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his *unreviewable discretion*, may decide that a person who is a refugee will not be returned without his consent. (d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

*Id.* (emphasis added) (citation omitted).

46. See *supra* note 39 (describing deteriorating conditions at the Guantanamo Naval Base).

47. Exec. Order No. 12,807, 3 C.F.R. 303. Pursuant to the President's authority to suspend the entry of undocumented aliens entering the United States by sea, President Bush directed the Coast Guard to "repatriate aliens interdicted beyond the territorial sea of the United States." *Id.*

48. Haitian Ctrs. Council, Inc. v. McNary, No. 92-CV1258, 1992 U.S. Dist. LEXIS 8452, at \*1-2 (E.D.N.Y. June 5, 1992), *rev'd*, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993).

49. *Id.* at \*6 (holding that section 243(h)(1) is not "a source of relief for Haitian aliens in international waters").

50. Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350, 1381 (2d Cir. 1992), *rev'd sub nom.* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993).

The United States policy of repatriating aliens without first considering their pleas for refugee protection raises a number of novel issues.<sup>51</sup> Congress did not explicitly state whether section 243(h)(1), as amended by the Refugee Act of 1980, creates extraterritorial refugee protection.<sup>52</sup> The statutory amendments and the lack of legislative history on the issue of extraterritoriality<sup>53</sup> led to a split between the United States Courts of Appeals for the Eleventh Circuit<sup>54</sup> and the Second Circuit.<sup>55</sup> The Supreme Court granted certiorari in *McNary v. Haitian Centers Council, Inc.*<sup>56</sup> to resolve the conflict.<sup>57</sup>

In *Sale*, the Supreme Court reviewed the Coast Guard's repatriation policy under the Kennebunkport Order<sup>58</sup> and held that neither the Refugee Act of 1980<sup>59</sup> nor the Protocol<sup>60</sup> protects Haitians interdicted on the high seas from being returned to Haiti, regardless of their qualification as political refugees.<sup>61</sup> The Court presumed that neither instrument provided for withholding of deportation proceedings when the refugees are found outside of United States territory.<sup>62</sup> The Court refuted the Haitian Centers' contention that Congress, by amending section 243(h)(1), intended to extend section 243(h)(1) protection to refugees found outside

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51. See EIC, *supra* note 4, at 7 (commenting that the recent surge in Chinese migrants attempting to reach the United States raises "serious questions about the feasibility of keeping all vessels transporting undocumented aliens outside U.S. territory").

52. See Refugee Act of 1980, Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107 (codified as amended 8 U.S.C. § 1253 (1988 & Supp. V 1993)); see *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2558-62 (1993).

53. See § 243(h)(1), 94 Stat. at 107; *McNary*, 969 F.2d at 1374 (Walker, J., dissenting) (explaining that the plain language of section 243(h)(1) is ambiguous).

54. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1514-15 (11th Cir. 1992) (holding that Haitians interdicted on the high seas are not entitled to deportation proceedings under section 243(h)(1) before repatriation to their home country); see *infra* notes 141-49 and accompanying text (discussing the Eleventh Circuit's decision).

55. *McNary*, 969 F.2d at 1367 (holding that aliens intercepted on the high seas are entitled to deportation proceedings under section 243(h)(1) before repatriation to their home country); see *infra* notes 150-71 and accompanying text (discussing the Second Circuit's decision).

56. 113 S. Ct. 52 (1992). The Commissioner of the INS appealed the Second Circuit's decision to the United States Supreme Court. *Id.*

57. See *Sale*, 113 S. Ct. at 2558 (explaining that the Court granted certiorari to resolve whether the Refugee Act of 1980 or the Protocol protects refugees interdicted extraterritorially).

58. See *supra* note 45 (setting forth the text of the Kennebunkport Order).

59. See *supra* note 23 and accompanying text (discussing section 243(h)(1) as amended by the Refugee Act of 1980).

60. See *supra* notes 16-17 and accompanying text (addressing Article 33 of the Protocol).

61. *Sale*, 113 S. Ct. at 2567.

62. *Id.* at 2551. The Court concluded that "it is presumed that Acts of Congress do not ordinarily apply outside the [United States] borders." *Id.*

of United States territory.<sup>63</sup> The Court reasoned that when Congress amended section 243(h)(1), its sole intention was to extend the application of the section to exclusion proceedings, not to expand the section's application to the high seas.<sup>64</sup>

Justice Blackmun, dissenting, argued that the Court incorrectly presumed that section 243(h)(1) has no application outside of the United States.<sup>65</sup> According to Justice Blackmun, Congress indicated its intent to apply the statute outside of United States territory by deliberately deleting the territorial restriction<sup>66</sup> and prohibiting both the return and the deportation of aliens to countries where they would be persecuted.<sup>67</sup> Justice Blackmun asserted that Article 33 of the Protocol<sup>68</sup> applies on the high seas because the treaty imposes no geographical limitations when it is interpreted according to general rules of treaty construction.<sup>69</sup>

On May 7, 1994, President Clinton announced that he would discontinue President Bush's policy of summary repatriation of Haitian boat people.<sup>70</sup> Although President Clinton's new policy of processing interdicted Haitians' claims for asylum approaches the United Nations' Protocol obligations, the *Sale* decision authorizes the President to reinstate a policy of automatic repatriation at any time.<sup>71</sup> As a result of the potential

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63. *Id.* at 2561. Section 243(h)(1) affords protection to refugees by withholding their deportation into the hands of their persecutors. *Id.* at 2560-61.

64. *Id.* Exclusion proceedings refer to the process by which an alien is denied legal entry into the United States. 8 U.S.C. § 1182(a)(3)(D) (1988).

65. *Sale*, 113 S. Ct. at 2576-77 (Blackmun, J., dissenting).

66. *See id.* at 2577; *infra* text accompanying note 92 (explaining that the Refugee Act of 1980 removed the phrase "within the United States" from section 243(h)(1)); *see also* Refugee Act of 1980, Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)). Section 243(h), as amended by the Refugee Act of 1980, provides that "[t]he Attorney General *shall* not deport or return *any* alien" to a nation if he or she concludes that the life or freedom of the alien "would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993) (emphasis added). Note that the statute does not afford protection to aliens excluded by section 241(a)(19) or paragraph (2) of section 243(h). *Id.*

67. *Sale*, 113 S. Ct. at 2574-75 (Blackmun, J., dissenting); *see infra* note 92 (explaining that the Refugee Act of 1980 added the term "return" to the text of section 243(h)(1)).

68. *See supra* note 17 (setting forth the text of Article 33 of the Protocol).

69. *Sale*, 113 S. Ct. at 2569 (Blackmun, J., dissenting).

70. *See* Ann Devroy, *U.S. to Expand Offshore Processing of Haitians*, WASH. POST, May 8, 1994, at A1 (announcing President Clinton's decision to begin processing Haitian refugees on large ships anchored offshore of Haiti or in volunteering third countries). This Note analyzes the Haitian interdiction policy prior to President Clinton's decision to begin off-shore processing of Haitian boat people. Immigration officials explain that fewer than five percent of Haitians who apply for political asylum qualify, and it is believed that this percentage will not change under the new policy. *Id.* at A1, A27.

71. *See infra* notes 178-211 and accompanying text (discussing the majority and dissenting opinions of the *Sale* decision).

for the reinstatement of an automatic repatriation policy and because of the due process problems associated with on-board processing, President Clinton's new policy does not guarantee protection for Haitian refugees.<sup>72</sup>

This Note focuses on the question of whether aliens interdicted outside of United States territory are protected by either the Refugee Act of 1980 or Article 33 of the Protocol. First, this Note explores the United States historical treatment of asylum-seekers and refugees through statutes and international agreements. This Note then discusses the judicial split between the Second and Eleventh Circuit Courts of Appeals regarding the applicability of section 243(h)(1) of the INA and Article 33 of the Protocol to extraterritorial seizures. This Note then analyzes the United States Supreme Court's majority and dissenting opinions in *Sale v. Haitian Centers Council, Inc.*, finding that the Court's denial of protection to aliens who are intercepted extraterritorially violates the mandate of the Refugee Act of 1980 and the United Nations Protocol. Finally, this Note concludes that *Sale* will lead to disparate treatment among immigrants of different countries and will encourage foreign noncompliance with the Protocol.

## I. TREATMENT OF ALIENS FLEEING PERSECUTION

United States domestic law did not address the criteria for the admission of migrants fleeing persecution until Congress enacted the Displaced Persons Act of 1948.<sup>73</sup> The United States indicated its continuing commitment to provide asylum for those who feared persecution by adopting

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72. President Clinton's new policy reintroduces the due process problems addressed in *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F. Supp. 1396, 1405 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987); see *supra* notes 30-39 and accompanying text (discussing the United States government's failure to afford Haitian boat people due process when processing them aboard Coast Guard cutters). Robert Rubin of the Lawyers Committee for Civil Rights criticized President Clinton's new policy because "[p]otential refugees have the right to make their case before an appropriate hearing officer in circumstances that enable them to elaborate their cases fully and calmly and that offer them some access to assistance and even counsel. All of that is very difficult to accomplish on a ship." Roberto Suro, *Safe Havens for Haitians Should Follow, Refugee Advocates Say*, WASH. POST, May 9, 1994, at A13.

73. ch. 647, § 2, 62 Stat. 1009, 1010 (repealed by Act of September 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 654, 655); see *supra* notes 10-15 and accompanying text (illustrating that early refugee legislation admitted refugees based on considerations of nationality rather than whether authorities in their home country subjected them to persecution).

the Protocol in 1968<sup>74</sup> and, later, The Refugee Act of 1980.<sup>75</sup> United States law and international agreements are the primary sources of authority used to regulate the influx of aliens fleeing persecution.<sup>76</sup> Over the last decade, however, the law with respect to asylum-seekers and refugees has generated intense controversy, litigation, and confusion.<sup>77</sup>

A. *The 1968 Protocol: International Law Providing Protection for Aliens Fleeing Persecution*

The United Nations Protocol governs the treatment of aliens who are fleeing persecution.<sup>78</sup> Congress has incorporated some of the Protocol's principles and provisions into United States immigration law.<sup>79</sup> In fact, section 243(h)(1) of the Refugee Act of 1980 is very similar to Article 33 of the Protocol, which absolutely prohibits the return of a fleeing person to a country if her life or freedom is in jeopardy.<sup>80</sup>

In 1991, however, the United States Court of Appeals for the Eleventh Circuit found that Article 33 of the Protocol does not require United

74. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (explaining that the United States ratified the original United Nations Refugee Convention, thereby providing protection for persons fleeing persecution "when it acceded to the 1967 Protocol relating to the Status of Refugees"); *see supra* note 17 (providing the text of Article 33 of the Protocol).

75. Refugee Act of 1980, Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107; *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (explaining that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees").

76. *See FRAGOMEN & BELL*, *supra* note 2, at 6-1 to 6-8 (listing United States legislation and international agreements that provide protection for refugees); KURZBAN, *supra* note 12, at 158-62 (listing major sources of refugee law).

77. *See Asylum and Inspections Reform: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 1 (1993) (statement of Rep. Mazzoli). Mr. Mazzoli emphasized the extent of the United States refugee processing problem by illustrating that between 200,000 and 300,000 asylum cases were pending at the end of fiscal 1992, compared with 150 asylum officers. *Id.*; *see also* Ira H. Mehlman, *The New Jet Set*, NAT'L REV., Mar. 15, 1993, at 40 (claiming that as soon as aliens say the magic words, "political asylum," their chances of remaining in the United States are 93%); *supra* note 4 (discussing public concern over the negative impact of immigration on economic, social, and cultural conditions in the United States).

78. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The United States acceded to the Protocol in 1968. *See* KURZBAN, *supra* note 12, at 158-59 (noting that "[t]he Protocol adopted Articles 2-34 of the United Nations Convention Relating to the Status of Refugees").

79. KURZBAN, *supra* note 12, at 159 (explaining that the Protocol includes "provisions . . . [that] have been incorporated into [United States] domestic law" by comparing the definition of refugee in Article I, § 2 of the Protocol with section 101(a)(42) of the INA, as codified at 8 U.S.C. § 1101(a)(42) (1988)).

80. *Id.* (referring to Article 33 of the Protocol, which provides for an absolute ban on the "return of a person whose life or freedom would be threatened in the country s/he fled").

States courts to provide protection for aliens who have not reached United States territory.<sup>81</sup> The Court found that the Protocol is not a "‘self-executing’ international" accord because it only provides enforceable rights upon congressional implementation.<sup>82</sup> Nevertheless, in addition to international agreements, documents, and other customary instruments of international law,<sup>83</sup> many agencies, practitioners, and courts use the Protocol as a basis for interpreting United States refugee and asylum law.<sup>84</sup>

*B. The Refugee Act of 1980: Protection Under United States Law for Persons Who Are Fleeing Persecution*

The Refugee Act of 1980,<sup>85</sup> enacted with the intent to conform United States refugee law to the 1967 Protocol,<sup>86</sup> is one of Congress' most mean-

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81. *Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (holding that "the Protocol and the history of the United States accession to [the Protocol] leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs"), *cert. denied*, 112 S. Ct. 1245 (1992).

82. *Id.* (ruling that the Protocol provides no enforceable rights to Haitians who have not reached United States territory because the Protocol is not self-executing); see *Haitian Refugee Ctr., Inc. v. Gracey*, 809 F.2d 794, 796 (D.C. Cir. 1987). The Eleventh Circuit explained that "[a] 'self-executing' international agreement is one that directly accords enforceable rights to persons without the benefit of Congressional implementation." *Baker*, 949 F.2d at 1110.

83. KURZBAN, *supra* note 12, at 160 (referring to the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the *Collection of International Instruments Concerning Refugees* (Geneva 1979)). In some instances, federal courts refer to customary international law to determine claims regarding human rights. *Id.* But see *In re Medina*, 19 I. & N. Dec. 734, 747 (B.I.A. 1988) (holding that neither international agreements nor customary international law provide deportable aliens with remedies above and beyond those provided under the INA).

84. See KURZBAN, *supra* note 12, at 159. The Board of Immigration Appeals and federal courts sometimes consult a publication by the Office of the United Nations High Commissioner for Refugees, entitled *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva 1979), to interpret terms and procedures under United States asylum and refugee law. *Id.*

85. Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1101 (1988 & Supp. V 1993)); see *supra* note 23 and accompanying text (discussing section 243(h)(1) as amended by the Refugee Act of 1980).

86. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (explaining that one of Congress' principal purposes in passing the Refugee Act of 1980 "was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees"); *INS v. Stevic*, 467 U.S. 407, 421 (1984) (stating that Congress amended section 243(h) and "basically conform[ed] it to the language of Article 33 of the United Nations Protocol"); see also S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1980), *reprinted in* 1980 U.S.C.A.N. 141, 144 (explaining that the bill's new definition of refugee eliminates geographical and ideological restrictions to "bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees"); H.R. CONF. REP. NO. 212, 96th Cong., 1st Sess. 19 (1980), *reprinted in*



ingful humanitarian acts.<sup>87</sup> This amendment to the INA<sup>88</sup> is the principal law governing United States policy toward persons who are fleeing persecution.<sup>89</sup> The Refugee Act of 1980 made three fundamental changes to the INA that protected refugee or refugee-related entrants. First, Congress changed section 207 to provide fleeing persons with an overseas refugee-processing procedure in their native countries or in third countries.<sup>90</sup> Second, Congress amended section 208 to create a statutory right for aliens to apply for political asylum if they are "physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum."<sup>91</sup> Third, Congress redrafted section 243(h)(1) to guarantee that any alien who qualifies as a refugee will not be returned to his or her home country. Further, Congress deleted the territorial restriction, within the United States, from the language of that provision.<sup>92</sup>

A person who fears persecution in her native country may gain legal admission to the United States as a refugee or an asylee. The United States considers an individual to be a refugee if (1) she is outside of the country of her nationality,<sup>93</sup> and (2) she is unable or unwilling to return to

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1980 U.S.C.C.A.N. 160, 160 (explaining that the Senate bill provided for withholding deportation of aliens to countries where they would be persecuted, unless the Protocol would permit an alien's deportation).

87. 126 CONG. REC. 4501 (1980) (providing statements of Rep. Rodino who commented that the Refugee Act of 1980 is "one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress").

88. ch. 477, § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. V 1993)).

89. Under United States law, persons who are fleeing persecution may seek entry into the United States if they can be classified in one of several categories. KURZBAN, *supra* note 12, at 162. The two most important classifications for Haitian refugees are (1) political asylees under section 208 and (2) "persons seeking withholding of deportation or exclusions for fear of persecution" under section 243(h)(1). *Id.* The United States cannot repatriate Haitians likely to encounter political persecution in Haiti if they satisfy the terms of these categories. *Id.* Haitian refugees also can gain admittance into the United States under the INA if they fall into other refugee-related categories such as "normal flow refugees" covered by section 207(a); "refugees of special humanitarian concern" addressed in section 207(b); parolees encompassed by section 212(d)(5); "persons granted extended voluntary departure" under section 204(e); and those granted "temporary protected status" (TPS) under section 244(a). *Id.*

90. 8 U.S.C. § 1157(a)(3) (1988). As amended, section 207(a)(3) of the INA authorizes Consular Officers in United States Embassies overseas and INS officers to process refugees who are admitted under section 207(a)(1). *Id.*

91. *Id.* § 1158(a).

92. *See id.* § 1253(h)(1). Section 1253(h)(1) also prohibits the Attorney General from "deport[ing] or return[ing]" aliens who are likely to be subjected to racial, religious, or political persecution. *Id.*; *see supra* note 23 (setting forth the text of section 243(h)(1) as amended).

93. 8 U.S.C. § 1101(a)(42)(A).

that country due to previous persecution or a genuine fear of future persecution on the basis of her race, religion, nationality, or political opinion.<sup>94</sup>

The United States will grant asylum to a migrant who satisfies the statutory definition of a refugee under the INA<sup>95</sup> and is either within United States territory or is at a land border or port of entry.<sup>96</sup> The INA also grants asylum to aliens located outside of the United States if they qualify as refugees.<sup>97</sup> For example, the President may qualify a person as a refugee even if the person remains within the country of her nationality.<sup>98</sup>

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94. *Id.* (providing that an alien is a refugee if she refuses or is unable to return to her country due to past "persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion") *Id.*

Society often confuses the use of the terms "'refugee'" and "'asylee.'" See STEEL, *supra* note 3, § 8.07(a). A migrant must only meet the legal standard of refugee to be treated as such. *Id.* (explaining that labeling an alien as a refugee "is definitional only, and does not constitute a status"). Asylum, however, is a status granted to migrants who seek to enter, or have already entered, the United States and who qualify as a refugee. *Id.*

The Refugee Act of 1980 defined refugees as persons outside of United States territory who seek refugee status and persons within United States territory who seek asylum. 8 U.S.C. § 1101(a)(42); see STEEL, *supra* note 3, § 8.02. A person is considered a refugee under section 207 even if she is located within the country of her nationality. 8 U.S.C. § 1157(c)(1).

95. STEEL, *supra* note 3, § 8.07 (explaining that interchangeable use of the terms "'refugee,'" "'asylum,'" and "'asylee'" is incorrect). "Asylum" is a status granted to aliens who satisfy the definition of refugee, who made entry or who seeks to make entry into the United States, and who meets the requirements for obtaining asylum under 8 U.S.C. § 1158. *Id.*; see 8 U.S.C. § 1158 (setting forth asylum procedures); see also *id.* § 1101(a)(42)(A) (defining the term refugee).

96. 8 U.S.C. § 1158(a) (providing that to qualify as an asylee, a person also must be "physically present in the United States or at a land border or port of entry"); see FRAGOMEN & BELL, *supra* note 2, at 6-24 (explaining that persons at a port of entry can apply for political asylum); KURZBAN, *supra* note 12, at 165 (noting examples of aliens requesting asylum in the United States including "Haitian and Mariel-Cuban applicants who present themselves at land borders or ports of entry when seeking refuge in the U.S., or the El Salvadoran and/or Nicaraguan applicants who seek asylum after entering the U.S.")).

97. 8 U.S.C. §§ 1157, 1158 (providing for the admission of a maximum number of aliens who satisfy the definition of refugee and apply for admission from outside the United States or at its borders).

98. *Id.* § 1101(a)(42)(B); see *id.* § 1157(a)(1) to (3) (providing for annual designations by the President, in consultation with Congress, of those people who qualify as refugees based on humanitarian or national interests); *id.* § 1157(b) (noting that the President may admit, "after appropriate consultation" with Congress, refugees of particular humanitarian concern if an unanticipated emergency makes their admission a "grave humanitarian concern" or is otherwise in the national interest"); see also JOYCE C. VIALET, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 1, 3 (Congressional Research Service Issue Brief No. IB89025, 1993) (stating that in 1980, President Carter approved the admission of 3,500 Cubans in Havana, Cuba (also known as the *Mariel* Boatlift); in 1988, President Reagan

In the Refugee Act of 1980, Congress amended section 243(h)(1) of the INA to provide for mandatory withholding of deportation and a prohibition against the return of a refugee to her native country.<sup>99</sup> Under the Refugee Act, eligibility requirements are similar for asylum claims and withholding of deportation.<sup>100</sup> Under both proceedings, the migrant must show that she will be persecuted or that she has a reasonable fear of being persecuted upon return to her country of origin.<sup>101</sup> Nonetheless, an alien is more likely to be admitted into the United States when seeking asylum than when requesting withholding of deportation.<sup>102</sup> Judicial scrutiny is greater in deportation proceedings than in asylum proceedings<sup>103</sup> because withholding of deportation is mandatory, while asylum is discretionary.<sup>104</sup> In deportation proceedings, an alien must demonstrate a " 'clear probability' " that she will be subject to persecution; whereas in asylum hearings, an alien need only demonstrate a " 'well-founded fear' " of persecution.<sup>105</sup>

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admitted 15,000 refugees from the Soviet Union and Eastern Europe; and in 1989, President Bush granted admission to 22,500 refugees, primarily from the Soviet Union).

99. 8 U.S.C. § 1253(h)(1). As amended, section 243(h)(1) *requires* the Attorney General to withhold deportation if officials determine that the alien is threatened by persecution. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1357-58 (2d Cir. 1992), *rev'd sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *see also* KURZBAN, *supra* note 12, at 174-75 (explaining that, under certain circumstances, the statute requires the Attorney General to withhold deportation of refugees).

100. *Compare* 8 U.S.C. § 1158(a) (providing that the Attorney General shall establish a procedure to grant asylum to aliens who are refugees within the meaning of the INA) *with* 8 U.S.C. § 1253(h)(1) (prohibiting the Attorney General from repatriating aliens whose lives or freedom will be threatened due to race, religion, nationality, or social or political affiliation). An alien may apply for both political asylum under section 208 and withholding of deportation under section 243(h)(1) if she satisfies the definition of refugee under the INA. FRAGOMEN & BELL, *supra* note 2, at 6-7, 6-8; *see* STEEL, *supra* note 3, § 8.12(a) (explaining that when certain conditions exist, an alien may apply for "adjustment of status" after one year of asylum). Withholding of deportation requires a more stringent showing of proof of persecution than the granting of asylum. FRAGOMEN & BELL, *supra* note 2, at 6-8.

101. *See* 8 U.S.C. § 1101(a)(42)(A) (defining a "refugee" as a person who is outside of the country of her nationality and who will not return to that country because of persecution on the basis of race, religion, nationality or social or political affiliation); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (explaining that an alien is entitled to withholding of deportation if she demonstrates that " 'it is more likely than not' " that she will be persecuted (quoting *INS v. Stevic*, 467 U.S. 407, 429-30 (1984))).

102. *See* STEEL, *supra* note 3, § 8.12(b). Asylum is preferable to withholding of deportation because asylum is a general provision, whereas withholding of deportation only applies to specified countries. *Id.* Also, while asylum usually results in permanent residence status, withholding of deportation only continues as long as the alien can show that she will be subject to persecution if returned to her home country. *Id.*

103. *Id.*

104. *See* McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981).

105. *See* Cardoza-Fonseca, 480 U.S. at 430.

## II. DIVERGENT HOLDINGS ON EXTRATERRITORIAL PROTECTION FOR REFUGEES

### A. *The Majority Rule: Protection for Potential Refugees Within the United States Only*

Before Congress enacted the Refugee Act of 1980, section 243(h)(1) of the INA only withheld the deportation of refugees who were legally present within the United States.<sup>106</sup> In *Leng May Ma v. Barber*,<sup>107</sup> the United States Supreme Court defined the phrase “ ‘within the United States’ ” as it appeared in section 243(h)(1) prior to 1980.<sup>108</sup> No court addressed the significance of Congress’ deletion of this phrase until a group representing interdicted Haitians challenged President Reagan’s interdiction policy.<sup>109</sup>

#### 1. *Leng May Ma: Denial of Protection Outside United States Territory*

Using the INA as it existed prior to its amendment in 1980,<sup>110</sup> the Supreme Court in *Leng May Ma v. Barber*, decided that an alien must be legally present within the United States to come within the protection of section 243(h)(1) of the INA.<sup>111</sup> In *Leng May Ma*, the petitioner, an immigrant from China, applied for withholding of deportation under section 243(h)(1) of the INA, while the INS released her on temporary parole<sup>112</sup> within the United States.<sup>113</sup> *Leng May Ma* alleged that she would be killed or subjected to physical persecution by the Chinese government if she were returned to China.<sup>114</sup> After being denied section 243(h)(1) protection, *Leng May Ma* sought a writ of habeas corpus.<sup>115</sup> The district

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106. See *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1509 (11th Cir. 1992). The Eleventh Circuit explained that before Congress amended section 243(h), it read:

“The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.”

*Id.* (emphasis added) (quoting 8 U.S.C. § 1253(h) (1976)).

107. 357 U.S. 185 (1958), *superseded by statute as stated in* *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987).

108. *Id.* at 188-89.

109. See *infra* notes 124-49 and accompanying text (discussing the Haitian Refugee Centers’ challenge of President Reagan’s interdiction policy).

110. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)).

111. *Leng May Ma*, 357 U.S. at 189.

112. See *supra* note 12 (explaining the meaning of parole).

113. *Leng May Ma*, 357 U.S. at 186.

114. *Id.*

115. *Id.*

court denied the writ and the United States Court of Appeals for the Ninth Circuit affirmed the ruling.<sup>116</sup> *Leng May Ma* appealed the ruling and the Supreme Court granted certiorari.<sup>117</sup>

The Supreme Court ruled that aliens who are on temporary parole are not legal entrants into the United States, even though they are physically present within the United States.<sup>118</sup> The Court held that because *Leng May Ma* was not legally present within the United States, she was not eligible for protection within the meaning of section 243(h)(1).<sup>119</sup> The INS subsequently deported *Leng May Ma*.<sup>120</sup>

## 2. *Post-Refugee Act Decisions: Limiting Section 243(h)(1) Protection to Aliens Within the United States*

Even after Congress deleted the phrase "within the United States" from section 243(h)(1) of the Refugee Act of 1980,<sup>121</sup> courts continued to limit the application of section 243(h)(1) of the INA to aliens who were legally and physically present in the United States. Haitian migrants interdicted on the high seas were the only plaintiffs to raise the issue of whether Congress' omission of the phrase "within the United States" eliminated geographical restrictions on the applicability of section 243(h)(1).<sup>122</sup> No court addressed the issue of whether section 243(h)(1) applies extraterritorially until nearly thirty years after the *Leng May Ma* decision.<sup>123</sup>

116. *Leng May Ma v. Barber*, 241 F.2d 85, 86 (9th Cir. 1957), *aff'd*, 357 U.S. 185 (1958).

117. *Leng May Ma v. Barber*, 353 U.S. 981 (1957) (granting certiorari).

118. *Leng May Ma*, 357 U.S. at 188 (explaining that the Court historically has treated aliens who are in custody pending determination of their admissibility as "not [ ] 'within the United States' for purposes of section 243(h)").

119. *Id.* at 185-90. *Leng May Ma*'s "excluded alien" status precluded her legal presence within the United States. *Id.* at 186.

120. *Id.* at 190.

121. Refugee Act of 1980, Pub. L. No. 96-212, § 243(h)(1), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993)). The legislative history of the Refugee Act of 1980 does not provide any reason for Congress' deletion of "within the United States" from section 243(h). See S. REP. NO. 256, 96th Cong., 1st Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 141-64.

122. See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2562 (1993) (ruling that section 243(h)(1) does not apply extraterritorially); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1360 (2d Cir. 1992) (finding that section 243(h)(1) applies extraterritorially), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1518 (11th Cir. 1992) (holding that section 243(h)(1) does not apply extraterritorially); *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F. Supp. 1396, 1406-07 (D.D.C. 1985) (holding that section 243(h)(1) does not apply extraterritorially), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

123. See *infra* part II.A.2 and accompanying text (discussing cases examining whether section 243(h)(1) protects Haitians interdicted on the high seas).

In *Haitian Refugee Center, Inc. v. Gracey*,<sup>124</sup> the plaintiffs<sup>125</sup> challenged President Reagan's interdiction policy<sup>126</sup> in the United States District Court for the District of Columbia, alleging that the policy violated the rights of interdicted Haitians under the INA, as amended by the Refugee Act of 1980.<sup>127</sup> The Haitian Refugee Center also claimed that the program failed to fulfill the " 'nonrefoulement obligation' " <sup>128</sup> imposed by Article 33 of the Protocol.<sup>129</sup> The district court dismissed the complaint, reasoning that although the plaintiffs had standing to sue, the Haitian Center failed to state a claim upon which relief could be granted.<sup>130</sup>

Specifically, the district court held that the INA and the Refugee Act of 1980 provided no relief to Haitians interdicted outside of United States territory.<sup>131</sup> The court reasoned that because section 243(h)(1) is located in part V of the INA, which governs deportation and adjustment of status, section 243(h)(1) only applies to aliens " 'in the United States.' " <sup>132</sup> The court concluded that in this case, the intercepted Haitians were not entitled to the benefit of section 243(h)(1) because " 'exclusion or deportation proceedings' are restricted to aliens arriving 'at any port within the United States.' " <sup>133</sup>

The district court further found that the interdiction program did not violate the Protocol because the Protocol is not self-executing.<sup>134</sup> As a result, the court concluded that the treaty's provisions are not a source of rights under United States domestic law.<sup>135</sup> In other words, the Protocol alone affords no protection to refugees unless Congress implements legis-

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124. 600 F. Supp. at 1396.

125. One plaintiff, the Haitian Refugee Center, Inc. (HRC), is a nonprofit membership corporation whose sole purpose "is to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation." *Id.* at 1401. HRC and two of its members were plaintiffs. *Id.*

126. *See supra* notes 30-33 and accompanying text (setting forth President Reagan's interdiction policy).

127. *Gracey*, 600 F. Supp. at 1401-03.

128. *Id.* at 1401; *see also* CASSELL'S FRENCH DICTIONARY 627 (1981) (defining "refouler" as meaning "[t]o drive back . . . to repel").

129. *Gracey*, 600 F. Supp. at 1401; *see supra* note 17 (setting forth the provisions of the Protocol relating to the Status of Refugees).

130. *Gracey*, 600 F. Supp. at 1401-03.

131. *Id.* at 1404.

132. *Id.* (quoting 8 U.S.C. §§ 1251, 1253(a)).

133. *Id.* (quoting 8 U.S.C. §§ 1221, 1362).

134. *Id.* at 1406; *see also* *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (holding "that the Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation").

135. *Gracey*, 600 F. Supp. at 1405 (explaining that "it has long been established that for a treaty to provide rights enforceable in a United States Court, the treaty must be one which is self-executing").

lation to provide such protection.<sup>136</sup> The court warned that the Refugee Act of 1980 does not grant any rights to aliens outside of the United States even though Congress implemented the Protocol through the Refugee Act of 1980.<sup>137</sup> Accordingly, the court held that the Protocol does not protect aliens who are interdicted outside of United States borders.<sup>138</sup>

The *Gracey* court also noted that the President's authority to interdict illegal aliens on the high seas arises from statutory and constitutional sources.<sup>139</sup> The court determined that these provisions clearly demonstrate congressional intent to grant broad discretion in alien immigration policy to the President.<sup>140</sup>

In *Haitian Refugee Center, Inc. v. Baker*,<sup>141</sup> the United States Court of Appeals for the Eleventh Circuit agreed with the *Gracey* court's decision regarding the substantive protections available to Haitian migrants under the INA.<sup>142</sup> Specifically, the court concluded that Haitians interdicted on the high seas receive no protection under section 243(h)(1) because it is

136. *Id.* (stating that the treaty "provided that the signatories were to communicate to the United Nations the 'laws and regulations which they adopt to ensure the application of the present Protocol' " (quoting Protocol, *supra* note 16, 19 U.S.T. 6223, 6226, 606 U.N.T.S. 267)).

137. *Id.* at 1406-07; see Refugee Act of 1980, Pub. L. No. 96-212, § 243(h), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1253(h) (1988 & Supp. V 1993)).

138. *Gracey*, 600 F. Supp. at 1406-07.

139. *Id.* at 1399-1400. The court relied on the Supreme Court's ruling in *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), which states that a sovereign's right to exclude aliens is inherent in the executive's power to control foreign affairs. *Gracey*, 600 F. Supp. at 1400.

The *Gracey* court also noted two statutory provisions that grant the President express authority to suspend the entry of illegal aliens on the high seas: 8 U.S.C. § 1182(f) and 8 U.S.C. § 1185(a)(1). *Id.* at 1399. The Court noted that section 1182(f) provides:

"Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate."

*Id.* (quoting 8 U.S.C. § 1182(f)). In addition, the court noted that section 1185(a)(1) provides that "[u]nless otherwise ordered by the President, it shall be unlawful—(1) for any alien to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." *Id.* (quoting 8 U.S.C. § 1185(a)(1)).

140. *Gracey*, 600 F. Supp. at 1399-1400 (explaining " 'that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations' " (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952))); see also *Knauff*, 338 U.S. at 542 (noting that "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power" but rather "[i]t is implementing an inherent executive power").

141. 953 F.2d 1498 (11th Cir. 1992).

142. *Id.* at 1510 (citing *Gracey*, 600 F. Supp. at 1404).

located in part V of the INA, which only applies to aliens "in the United States."<sup>143</sup>

The Haitian Center sought a temporary restraining order in the United States District Court for the Southern District of Florida to enjoin President Reagan's Haitian interdiction policy on the grounds that it violated the Protocol and the INS procedures that protect refugees from forced repatriation.<sup>144</sup> The district court granted the injunction<sup>145</sup> and the defendants sought a stay of enforcement from the United States Court of Appeals for the Eleventh Circuit.<sup>146</sup>

The Eleventh Circuit asserted that in 1980 Congress deleted the phrase "within the United States" from section 243(h)(1) and added the words "or return" in order "to conform with Article 33 of the Protocol."<sup>147</sup> The court concluded that section 243(h)(1) applies only within the territory of each signatory.<sup>148</sup> Therefore, aliens interdicted outside of United States borders may not avail themselves of any rights under section 243(h)(1).<sup>149</sup>

#### B. The Minority View: Refugee Protection for All

In contrast to the Eleventh Circuit, the United States Court of Appeals for the Second Circuit ruled that section 243(h)(1) does afford protection to aliens interdicted on the high seas.<sup>150</sup> In *Haitian Centers Council, Inc. v. McNary*, the Haitian Centers appealed a district court's denial of their request for a temporary restraining order against President Bush's Hai-

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143. *Id.* (citing 8 U.S.C. §§ 1251, 1253(a) (1988)).

144. *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1554 (S.D. Fla.), *rev'd*, 949 F.2d 1109 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). The Haitian Refugee Center, Inc. alleged that the United States Government violated INS procedural rules and Article 33 of the Protocol by repatriating Haitians without providing them with adequate legal protection. *Id.*

145. *Id.* at 1578-79. The order prohibited the government from repatriating Haitians being held aboard United States vessels, on land under United States control, or at Guantanamo.

146. *Baker*, 953 F.2d at 1504-05.

147. *Id.* at 1509-10.

148. *Id.* at 1510. The Eleventh Circuit, using the same reasoning as the *Gracey* court, found that section 243(h)(1) does not apply extraterritorially because of its location in part V of the INA, and because section 208 provides asylum proceedings only to those "in the United States or at its borders or a port of entry." *Id.*; see *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F. Supp. 1396, 1404 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

149. *Baker*, 953 F.2d at 1510 (holding that because the Coast Guard intercepted Haitians on the high seas, they are not at a land border or port of entry, and thus are not protected by section 243(h)(1)).

150. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1367 (2d Cir. 1992), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).



tian interdiction policy.<sup>151</sup> The Second Circuit ruled that the plain meaning of section 243(h)(1), as amended by the Refugee Act of 1980,<sup>152</sup> protected Haitians interdicted in international waters.<sup>153</sup> The court of appeals rejected the government's assertion of a presumption against extraterritorial application of domestic laws regarding Haitians interdicted on the high seas.<sup>154</sup> The Second Circuit found that the presumption against extraterritoriality arises only when a statutory provision is unclear or when it conflicts with the interests or the jurisdictions of foreign countries.<sup>155</sup> According to the Second Circuit, the presumption against extraterritoriality did not apply to the interdicted Haitians because section 243(h)(1), as amended, clearly expresses congressional intent that extraterritoriality does not affect the meaning of term " 'alien' " as used in the provision.<sup>156</sup> The court further reasoned that prohibiting the return of interdicted Haitians did not compromise the interests or the jurisdictions of foreign nations.<sup>157</sup>

The government also argued that because of the close relationship between section 243(h)(1) and section 243(h)(2) of the INA,<sup>158</sup> section

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151. *Id.* at 1353; see *Haitian Ctrs. Council, Inc. v. McNary*, No. 92-CV-1258, 1992 WL 155853 at \*11 (E.D.N.Y. Apr. 6, 1992) (denying a request for a temporary restraining order). The Second Circuit determined that the doctrine of collateral estoppel did not bar it from considering the extraterritorial issue involved in this case, which the Eleventh Circuit previously had decided in *Haitian Refugee Centers, Inc. v. Baker*, because of the recent issuance of the Kennebunkport Order and other changes in United States Haitian immigration policy. *McNary*, 969 F.2d at 1355-57; see *supra* note 45 and accompanying text (discussing President Bush's Kennebunkport Order).

152. See *supra* text accompanying notes 20-27 (discussing the Refugee Act of 1980 and its effect on section 243(h)(1)).

153. *McNary*, 969 F.2d at 1357-58.

154. *Id.* at 1358.

155. *Id.* (ruling that the presumption against extraterritorial application of domestic laws is a canon of construction courts use to determine unexpressed congressional intent); see also *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (holding that the presumption against extraterritorial construction of domestic laws is designed to protect against inadvertent conflicts between domestic and foreign laws "which could result in international discord"), *superseded by statute as stated in Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992).

156. *McNary*, 969 F.2d at 1358.

157. *Id.* The Second Circuit also noted that "Congress [knows] 'how to place the high seas within the jurisdictional reach of a statute.'" *Id.* (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989)). Accordingly, Congress extended extraterritorial jurisdiction "by making § 243(h)(1) apply to 'any alien' without regard to location." *Id.* The *McNary* court also explained that section 243(h) has extraterritorial application "[o]nly when the United States itself acts extraterritorially." *Id.* The United States acts extraterritorially when it intercepts Haitians on the high seas.

158. Compare 8 U.S.C. § 1253(h)(1) (1988) (forbidding the Attorney General from deporting or returning any alien who may be subject to persecution) with 8 U.S.C. § 1253(h)(2)(C) (1988) (specifying that the Attorney General may deport or return an

243(h)(1) does not apply to those "who have not arrived in the United States."<sup>159</sup> The government urged this conclusion because section 243(h)(2) denies the protections of section 243(h)(1) where a reasonable belief exists that " 'the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.' "<sup>160</sup> Responding to the government's contention, the court explained that Congress included the phrase " 'prior to the arrival of the alien in the United States' " primarily to prevent the application of section 243(h)(1) to aliens who are nonpolitical criminals.<sup>161</sup> The Second Circuit found that the government's interpretation of the section violated the principles of statutory construction because it required the court to re-read the phrase " 'within the United States' " into section 243(h)(1). A phrase which Congress eliminated in the Refugee Act of 1980.<sup>162</sup> The Second Circuit was unwilling to accept such a result.<sup>163</sup>

Furthermore, the Second Circuit rejected the government's argument that the location of section 243(h)(1) in part V of the INA indicated that it only applied extraterritorially.<sup>164</sup> The court opined that the statute is

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alien who is subject to persecution if she committed a serious crime outside of the United States).

159. *McNary*, 969 F.2d at 1359.

160. *Id.* (emphasis added) (quoting 8 U.S.C. § 1253(h)(2)(C)).

161. *Id.* (quoting 8 U.S.C. § 1253(h)(2)(C)). This limitation complies with United States domestic interests in preventing alien criminals from entering this country, and with United States foreign policy interests in refusing to grant a "safe haven to non political criminals fleeing from other countries." *Id.*

162. *Id.* (citing *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2475 (1992), and *Brewster v. Gage*, 280 U.S. 327, 337 (1930)). The Second Circuit noted that the Supreme Court ruled that the doctrine of statutory construction requires the court to read Congress' change in the language of a statute to have some effect. *Id.* The court also mentioned the often-quoted principle of statutory construction that " 'Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.' " *Id.* (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)). The Supreme Court in *United States v. Missouri Pac. R.R.*, 278 U.S. 269 (1929), expounding the fundamental principle of statutory construction that when "doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure . . . may be taken into consideration to aid in the ascertainment of the true legislative intent." *Id.* at 278. The *Missouri Pacific* Court added that, "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences . . . legislative history may not be used to support a construction that adds to or takes from the significance of the words employed." *Id.*

163. *McNary*, 969 F.2d at 1359.

164. *Id.* at 1359-60. The court criticized the Eleventh Circuit's decision in *Baker* because the Eleventh Circuit almost exclusively relied on Congress' placement of section 243(h)(1) in part V of the INA when it concluded that the section has no extraterritorial effect. *Id.* at 1359; see *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1510 (11th Cir. 1992); *Haitian Refugee Ctr., Inc. v. Gracey*, 600 F. Supp. 1396, 1404 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

located in part V merely because it was placed there prior to the 1980 amendment.<sup>165</sup> Although Congress explicitly limited provisions of part V to aliens within the United States, the court found that it does not follow conclusively that section 243(h)(1) as amended is similarly affected.<sup>166</sup>

The Second Circuit did not address whether Article 33 of the Protocol is self-executing.<sup>167</sup> Instead, the court recognized that Congress intended to bring United States refugee law in compliance with the Protocol.<sup>168</sup> By analyzing the plain meaning of Article 33 of the Convention,<sup>169</sup> the court concluded that a contracting state's refouler responsibilities extend to the high seas.<sup>170</sup>

In effect, the Second Circuit's decision requiring the Coast Guard to withhold the deportation of refugees intercepted beyond United States borders directly contradicted the Eleventh Circuit's refusal to extend such protection to Haitians intercepted on the high seas.<sup>171</sup> Consequently, in *Sale v. Haitian Refugee Centers, Inc.*, the Supreme Court addressed the divergent rulings of the federal circuits regarding the extraterritorial application of section 243(h)(1).

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165. *McNary*, 969 F.2d at 1360 (stating that the location of the section "tends to prove that if Congress had meant to limit § 243(h)(1)'s scope to aliens 'in the United States', it surely knew how to do that").

166. *Id.* at 1360-61 (noting that very little prior litigation under section 243(h)(1) focused on the term "return" in the amended section, and concluding that the Kennebunkport Order violated the no-return provision of section 243(h)(1)). The Second Circuit also explained that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 1360 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

167. *See supra* notes 134-36 (discussing the concept of self-executing treaties).

168. *McNary*, 969 F.2d at 1361-66.

169. *Id.* at 1361; *see supra* note 17 and accompanying text (providing the text of Article 33).

170. *McNary*, 969 F.2d at 1366; *see supra* note 128 and accompanying text (defining refouler).

171. The Second Circuit determined that it was not bound by the Eleventh Circuit's ruling because the plaintiffs were not parties to the Eleventh Circuit action. *McNary*, 969 F.2d at 1355. The plaintiffs in *McNary* were interdicted under President Bush's Kennebunkport Order, while the Haitians in *Baker* protested President Reagan's interdiction program. *Id.*; *see* Interdiction Agreement Between the United States of America and Haiti, *supra* note 32. Under President Reagan's interdiction program, the United States repatriated those aliens who could not prove that they were refugees. *See Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1501 (11th Cir. 1992). The Kennebunkport Order, however, repatriated aliens without determining if they were refugees. *See supra* note 45 (discussing the Kennebunkport Order); *see also McNary*, 969 F.2d at 1355.

III. *SALE V. HAITIAN CENTERS COUNCIL, INC.*: LEGAL AND PHYSICAL  
ENTRANCE REQUIRED FOR PROTECTION UNDER SECTION  
243(H)(1)

In *Sale v. Haitian Centers Council, Inc.*,<sup>172</sup> the United States Supreme Court reversed the Second Circuit's holding in *Haitian Centers Council, Inc. v. McNary*.<sup>173</sup> Referencing the structure of the INA and the history of the Refugee Act of 1980, the Supreme Court refused to extend section 243(h)(1) protection to aliens interdicted on the high seas.<sup>174</sup> The Court applied a presumption against extraterritoriality of federal enactments<sup>175</sup> and concluded that the Court should construe section 243(h)(1) and the Protocol to apply only within the United States.<sup>176</sup> Thus, the Court held that an alien acquires protection under section 243(h)(1) only when she is physically and legally present within the United States.<sup>177</sup>

A. *The Majority: No Protection for Haitian Refugees on the High Seas*

Justice Stevens, writing for the majority, began by analyzing the text and structure of the INA.<sup>178</sup> The Court refused to construe section 243(h)(1) to compel the Attorney General to withhold deportation of aliens intercepted outside of United States borders.<sup>179</sup> According to the Court, part V of the INA, in which section 243(h)(1) is located, does not authorize the Attorney General to conduct deportation proceedings extraterritorially.<sup>180</sup> The Court added that even if part V of the INA en-

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172. 113 S. Ct. 2549 (1993).

173. *Id.* at 2567 (reversing the Second Circuit's decision in *McNary* to grant section 243(h)(1) protection to Haitian refugees on the high seas). The Supreme Court quoted Judge Edwards' concurrence in *Haitian Refugee Center, Inc. v. Gracey*, stating that "[t]his case presents a painfully common situation in which desperate people, convinced that they can no longer remain in their homeland, take desperate measures to escape. Although the human crisis is compelling, there is no solution to be found in a judicial remedy." *Id.* (quoting *Haitian Refugee Ctr., Inc. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring)).

174. *Id.* at 2559-62.

175. See *supra* notes 154-57 and accompanying text (explaining the underlying principles of the presumption against extraterritoriality).

176. *Sale*, 113 S. Ct. at 2560.

177. *Id.* at 2567.

178. *Id.* at 2559-60.

179. *Id.*

180. *Id.* The Court referred to section 1158(a) of the United States Code. Section 1158(a) directs the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry . . . to apply for asylum." 8 U.S.C. § 1158(a) (1988). The Court also relied on its decision in *INS v. Cardoza-Fonseca*, in stating that "[t]his standard for asylum is similar, but not quite as strict as the standard applicable to a withholding of deportation pursuant to § 243(h)(1)." *Sale*, 113 S. Ct. at 2554 n.11 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

compassed procedures outside of the United States, the presumption against extraterritoriality for congressional acts mandates that section 243(h)(1) only be applied within United States borders.<sup>181</sup> The Court ruled that if Congress intended section 243(h)(1) to apply extraterritorially, it would have explicitly provided for such an application.<sup>182</sup>

Next, the Court reviewed the history of the Refugee Act of 1980.<sup>183</sup> Justice Stevens referred to the Court's ruling in *Leng May Ma v. Barber*<sup>184</sup> to illustrate that the phrase "within the United States" pertains to the legal status of an alien, rather than her physical location.<sup>185</sup> The Supreme Court found that the Refugee Act of 1980 eliminated the long-standing distinction between deportation and exclusion proceedings for purposes of section 243(h)(1).<sup>186</sup> The Court noted that in 1953, the INA, as interpreted in *Leng May Ma*, did not provide section 243(h)(1) protection to aliens who were seeking admission and trying to avoid exclusion because its applicability was limited to those "within the United States."<sup>187</sup> The law did not treat excludable aliens as having entered the United States, even though they were physically within United States territory or at its border.<sup>188</sup> Conversely, after its amendment in 1980, the INA treated those who entered United States territory and sought to

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181. *Sale*, 113 S. Ct. at 2560 (referring to *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)). In addition, the Court noted that although the presumption against extraterritoriality serves to prevent conflicts with foreign laws, "the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations." *Id.*

182. *Id.* (citing *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989), which held that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute").

183. *Id.* at 2560-62; see *supra* note 21 (discussing the legislative history of the Refugee Act of 1980).

184. 357 U.S. 185 (1958), *superseded by statute as stated in* *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); see *supra* part II.A.1 (discussing the Court's decision in *Leng May Ma*).

185. *Sale*, 113 S. Ct. at 2560.

186. *Id.* at 2560-61. The Court explained that the legislative history of the 1980 amendment indicated that Congress intended "to apply § 243(h) to exclusion as well as to deportation proceedings." *Id.* at 2561. The Court referred to the House Report and noted that "the changes [in section 243(h)] 'require . . . the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation, proceedings.'" *Id.* at 2561 n.33 (alteration in original) (quoting H.R. REP. NO. 608, 96th Cong., 1st Sess. 30 (1979)). The Court insisted that the term "return," which was added in the 1980 amendment, referred only to exclusion proceedings. *Id.* at 2561. Thus, the Court concluded that the INA applies to both deportation and exclusion hearings. *Id.* To hold otherwise, the majority argued, would make the word "deport" in section 243(h) redundant. *Id.* at 2560. Otherwise, the section would read: the Attorney General shall not "deport" or "deport." *Id.*

187. *Id.* at 2561.

188. *Id.*

avoid deportation as aliens “ ‘within the United States’ ” for purposes of section 243(h)(1).<sup>189</sup> According to the majority, while the 1980 amendment extended protection to excludable aliens, it continued to maintain the presumption that section 243(h)(1) applied only to aliens found within United States borders.<sup>190</sup>

After reviewing the history of the Refugee Act of 1980, the majority analyzed the text and negotiating history of Article 33 of the Protocol to determine whether the Protocol imposes an extraterritorial responsibility beyond the language of the Refugee Act.<sup>191</sup> The Court conceded that the Refugee Act should not be read to limit the Protocol to the extent that the Protocol is more generous than the Refugee Act.<sup>192</sup> The Court, however, concluded that the negotiating history of Article 33 and the text of Articles 33.1 and 33.2 do not require extraterritorial protection.<sup>193</sup>

### *B. The Dissent: Domestic and International Protection for All Refugees*

In dissent,<sup>194</sup> Justice Blackmun concentrated on the Protocol and Congress’ deletion of the phrase “ ‘within the United States’ ” from section

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189. *Id.* The majority explained that the Court historically recognized additional rights and privileges for migrants who, regardless of legality of entry, are within the United States, while it denied these same rights and privileges to those aliens “ ‘on the threshold of initial entry.’ ” *Id.* (quoting *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958), *superceded by statute as stated in* *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987)); *see* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). In *Shaughnessy*, the Court ruled that when United States officials harbored an alien on Ellis Island, he did not enter the United States, and he therefore did not have the same due process rights as an alien who entered the United States. *Id.* at 212-13.

190. *Sale*, 113 S. Ct. at 2561. The Court explained that “[n]ot a scintilla of evidence of . . . [an intent to provide for extraterritorial application of the act] can be found in the legislative history.” *Id.* The Supreme Court emphasized that Congress would not make a dramatic change, such as extending the application of the Act outside United States borders, without explicitly stating its intention to do so. *Id.*

191. *Id.* at 2562. The Court explained that if the Protocol did impose such a responsibility, then “under the Supremacy Clause, that broader treaty obligation might then provide the controlling rule of law.” *Id.*; *see also id.* at 2562 n.35. The Court cited *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), which held that “ ‘an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.’ ” *Sale*, 113 S. Ct. at 2562 n.35 (quoting *Murray*, 6 U.S. (12 Cranch) at 118). The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2.

192. *Sale*, 113 S. Ct. at 2563.

193. *See id.*

194. *Id.* at 2568-77 (Blackmun, J., dissenting).

243(h)(1) of the INA.<sup>195</sup> Because Congress enacted the Refugee Act to conform United States domestic law to Article 33,<sup>196</sup> Justice Blackmun analyzed the Protocol as the "backdrop against which [section 243(h)(1)] must be understood."<sup>197</sup> Justice Blackmun concluded that the texts and histories of section 243(h)(1) and the Protocol require protection for all refugees, wherever found.<sup>198</sup>

According to the dissent, Article 33 unambiguously prohibits the return of a refugee without geographical limits.<sup>199</sup> Justice Blackmun criticized the majority for deferring to the Protocol's negotiating history for guidance rather than relying on the Protocol's language.<sup>200</sup> He stressed that the majority erred in relying on the Protocol's negotiating history because the negotiators' oral statements were not communicated to their respective governments or to the ratifying body.<sup>201</sup> Justice Blackmun also provided examples illustrating the United States' repeated acknowledgments that the Protocol applied on the high seas.<sup>202</sup>

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195. *Id.* at 2568 (arguing that the majority ignored the mandates of the Protocol and the Refugee Act of 1980 by denying Haitians outside of the United States protection from their persecutors). Justice Blackmun criticized the majority for deciding "that the forced repatriation of the Haitian refugees is perfectly legal, because the word 'return' does not mean return, because the opposite of 'within the United States' is not outside the United States." *Id.* (citations omitted).

196. *Id.* The dissent quoted Justice Scalia's partial concurrence and dissent in *INS v. Doherty*, stating that "'the nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *non-refoulement* obligations under Article 33.1.'" *Id.* (quoting *INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)).

197. *Id.*

198. *Id.* at 2568-77.

199. *See id.* at 2569-70.

200. *Id.* at 2571-73. Justice Blackmun wrote that "[i]t is axiomatic that a treaty's plain language must control absent 'extraordinarily strong contrary evidence.'" *Id.* at 2570 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). Justice Blackmun argued that, according to the Vienna Convention on the Law of Treaties, relying "on a treaty's negotiating history . . . is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results." *Id.* at 2571; *see* Vienna Convention on the Law of Treaties, May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340, 8 I.L.M. 692.

201. *Sale*, 113 S. Ct. at 2571 (citing *Arizona v. California*, 292 U.S. 341, 360 (1934)).

202. *Id.* at 2568-69. Justice Blackmun referred to a letter from the Office of the Attorney General to the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, which read that "'[a]liens who have not reached our borders (such as those on board interdicted vessels) are . . . protected . . . by the U.N. Convention and Protocol.'" *Id.* at 2568 n.3 (alterations in original) (quoting *United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., 208-09 (1981)); *see also* STEEL, *supra* note 3, § 8.02 (explaining that Congress adopted the definition of refugee in the Refugee Act of 1980 from the United Nations definition of refugee—"persons outside of

With respect to section 243(h)(1) of the INA, Justice Blackmun supported the Second Circuit's reasoning in *Haitian Centers Council, Inc. v. McNary*.<sup>203</sup> He criticized the majority for failing to adhere to the ordinary meaning of the words contained in the provision as amended.<sup>204</sup> He concluded that the presumption against extraterritorial application of United States domestic law did not apply in the *Sale* case because Congress' intent in its 1980 amendment of section 243(h)(1) is clear:<sup>205</sup> the Attorney General cannot return a refugee to her persecutors, regardless of her presence " 'within the United States.' "<sup>206</sup>

The dissent criticized the majority's reliance on *Leng May Ma v. Barber*,<sup>207</sup> which it found to be "a lone case from this Court that is not even mentioned in the legislative history and that had been on the books a full 22 years before the amendments' enactment."<sup>208</sup> Justice Blackmun emphasized that "[w]hen Congress in 1980 removed the phrase 'within the United States' [from section 243(h)(1)], it did not substitute any other geographical limitation."<sup>209</sup> The fact that Congress made changes to other provisions that did contain geographical restrictions,<sup>210</sup> Justice

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the United States seeking refugee status, and persons inside the United States seeking asylum").

203. 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *see supra* notes 150-71 and accompanying text (discussing the *McNary* decision).

204. *Sale*, 113 S. Ct. at 2574.

205. *Id.* at 2576.

206. *Sale*, 113 S. Ct. at 2574. Justice Blackmun explained that:

[t]he Refugee Act of 1980 explicitly amended [section 243(h)(1)] in three critical respects. Congress (1) deleted the words "within the United States"; (2) barred the Government from "return[ing]," as well as "deport[ing]," alien refugees; and (3) made the prohibition against return mandatory, thereby eliminating the discretion of the Attorney General over such decisions.

*Id.* (alterations in original).

207. 357 U.S. 185 (1958), *superseded by statute as stated in* *Amanullah v. Nelson*, 811 F.2d 1 (1st Cir. 1987); *see supra* notes 110-20 and accompanying text (discussing *Leng May Ma*); *supra* notes 184-90 and accompanying text (discussing the majority's reliance on *Leng May Ma*).

208. *Sale*, 113 S. Ct. at 2575. Justice Blackmun noted that the majority relied on a negative inference in its conclusion that Congress removed the phrase " 'within the United States' " only with the intent to extend the protections of section 243(h)(1) to excludable aliens. *Id.* Justice Blackmun noted that "nothing in *Leng May Ma* even remotely suggests that the *only* persons not 'within the United States' are those involved in exclusion proceedings." *Id.*

209. *Id.*

210. Justice Blackmun pointed specifically to section 208(a), which applies to those " 'physically present in the United States, or at a land border or entry port.' " *Id.*; *see* Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (codified as amended at 8 U.S.C. § 1158(a) (1988)).



Blackmun argued, indicated that Congress did not intend a similar limitation for section 243(h)(1).<sup>211</sup>

#### IV. EXTRATERRITORIAL PROTECTION FOR BONA FIDE REFUGEES AFTER *SALE V. HAITIAN CENTERS COUNCIL, INC.*

In contradiction of the Protocol's humanitarian aims and without any support from section 243(h)(1)'s legislative history, the United States Supreme Court refused to grant section 243(h)(1) protection to Haitians interdicted on the high seas.<sup>212</sup> The Court ignored the explicit language of the provision and the Protocol, and overturned the Second Circuit's decision by utilizing a "patchwork" of inferences, presumptions, fragments of legislative and negotiating histories, and text from other statutes.<sup>213</sup>

##### A. A Patchwork of Statutory Construction

##### 1. The Formidable Hurdle of the Presumption Against Extraterritoriality

The *Sale* majority concluded that neither international nor United States domestic law protects Haitians who are interdicted on the high seas.<sup>214</sup> The Court reached this conclusion primarily by applying the presumption against extraterritoriality to section 243(h)(1) of the INA and to Article 33 of the Protocol.<sup>215</sup> The Court, however, misapplied the presumption by inappropriately analogizing the *Sale* case to *Argentine Republic v. Amerada Hess Shipping Corp.*,<sup>216</sup> and by failing to recognize case law and public policy that support the extraterritorial application of section 243(h)(1) to Haitians interdicted on the high seas.<sup>217</sup>

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211. *Sale*, 113 S. Ct. at 2575.

212. *Id.* at 2567 (majority opinion).

213. See Respondent's Opposition for a Writ of Certiorari Brief at 24, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344) (arguing that the petitioners seek to overturn the Second Circuit decision based on an elaborate "patchwork of inapposite presumptions, negative inferences, text from other statutory provisions, snippets of legislative and negotiating histories, and their own reinterpreted litigation positions" to deny withholding of deportation protection to Haitian refugees).

214. *Sale*, 113 S. Ct. at 2567.

215. *Id.* at 2560. The majority explained that "the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory." *Id.*; see *id.* at 2565 (explaining that "a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent").

216. 488 U.S. 428 (1989).

217. See Brief for Nicholas DeB. Katzenbach, Benjamin R. Civiletti, and Griffin Bell, Former Attorneys General of the United States of America, as *Amici Curiae* in Support of Respondents at 15, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344).

The Court should not have invoked the presumption against extraterritoriality<sup>218</sup> because the application of section 243(h)(1) with respect to Haitian repatriation does not threaten the jurisdiction of other countries.<sup>219</sup> Sovereignities do not have the authority to apply their laws on the high seas.<sup>220</sup> In this case, Haitian repatriation occurs aboard United States Coast Guard cutters on the high seas.<sup>221</sup> Thus, when the Coast Guard intercepts Haitians on the high seas, it does not contravene any foreign nation's law.<sup>222</sup> The Court's conclusion that INA provisions do not apply extraterritorially unless they specifically provide for extraterritorial application renders President Bush's Kennebunkport Order, which

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[hereinafter Brief for Katzenbach]. The Court's reliance on *Argentine Republic* is misplaced because *Argentine Republic* is distinguishable from the *Sale* case. *Id.* In *Argentine Republic*, the Court applied the presumption against extraterritorial application to a tort case that occurred "on the high seas some 5,000 miles off the nearest shores of the United States." *Argentine Republic*, 488 U.S. at 440. Unlike *Sale*, however, the relevant statute in *Argentine Republic* expressly limited its application to damage "occurring in the United States." *Id.* at 439 (quoting 28 U.S.C. § 1605(a)(5) (1988)). In *Argentine Republic*, the Court invoked the presumption against extraterritorial application "to reenforce the plain language of the statute." Brief for Katzenbach, *supra*, at 15; see *infra* notes 214-36 and accompanying text (discussing case law and public policy considerations that support the extraterritorial application of section 243(h)(1)).

218. See *supra* note 181 and accompanying text (discussing the majority's application of the presumption against extraterritoriality); see also *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (holding that the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"), *superseded by statute as stated in Stender v. Lucky Stores*, 780 F. Supp. 1302 (N.D. Cal. 1992); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (providing that the presumption against extraterritoriality is a "canon of construction . . . whereby unexpressed congressional intent may be ascertained").

219. See Brief for Katzenbach, *supra* note 217, at 14-15. Granting Haitian boat people protection under section 243(h)(1) does not violate the jurisdiction of other nations because on the high seas, there is no foreign law with which to interfere. *Id.*

220. *Id.*; see *United States v. Wright-Barker*, 784 F.2d 161, 166 (3d Cir. 1986) (explaining that "no nation may assert territorial jurisdiction" over the high seas); see also *United States v. Louisiana*, 363 U.S. 1, 33-34 (1960) (holding that modern nations agree that no single nation controls the high seas); cf. *Skiriotes v. Florida*, 313 U.S. 69, 78 (1941) (suggesting that a person on the high seas may be subject to the laws of a sovereign state).

221. See *Sale*, 113 S. Ct. at 2553.

222. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 502(2) (1987) (explaining that "[t]he flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship"); see Brief for Katzenbach, *supra* note 217, at 14-15 (explaining that the United States Coast Guard does not interfere with foreign law aboard its cutters on the high seas).

was authorized by section 212(f) of the INA,<sup>223</sup> inapplicable outside of United States borders.<sup>224</sup>

Additionally, the Supreme Court has allowed extraterritorial application of generally-worded statutes on a statute-by-statute basis.<sup>225</sup> For example, the Court applies generally-worded United States antitrust laws,<sup>226</sup> criminal statutes,<sup>227</sup> and patent laws extraterritorially.<sup>228</sup> In an effort to satisfy their legislative purposes,<sup>229</sup> the Court applies these statutes outside of United States borders even though none of these laws explicitly provide for extraterritorial application.<sup>230</sup> Consequently, this same principle applies to section 243(h)(1) because Congress deleted the domestic restriction, "within the United States," and because the legislative history of the Refugee Act of 1980 underscores the United States commitment to refugees, regardless of nationality.<sup>231</sup>

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223. 8 U.S.C. § 1182(f) (1988); see *supra* note 45 and accompanying text (providing the text of the Kennebunkport Order). This section of the INA makes no express indication of extraterritorial application. See 8 U.S.C. § 1182(f).

224. Brief for Katzenbach, *supra* note 217, at 12. The Former Attorneys General explained that to presume the INA does not apply extraterritorially "in the absence of express language to that effect would make administration of the INA—including the Executive actions in this very case—impossible." *Id.* They also noted that "[l]ike Section 1253(h), Section 212(f) refers simply to 'any aliens or . . . any class of aliens,' making no mention of geographical location." *Id.* (alteration in original) (quoting 8 U.S.C. § 1182(f)).

225. *Id.*

226. See *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (applying the Jones Act extraterritorially).

227. See *Ford v. United States*, 273 U.S. 593, 617 (1927) (applying a tariff act extraterritorially).

228. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952) (applying the Lanham Trade-Mark Act extraterritorially).

229. See, e.g., *Steele*, 344 U.S. at 285 (applying the Lanham Act extraterritorially to serve the legislative intent of the Act by protecting trade-mark registrants against unfair competition).

230. See, e.g., 15 U.S.C. § 1127 (1988); 46 U.S.C. § 688(a) (1988); Tariff Act of September 21, 1922, ch. 356, § 593(b), 42 Stat. 858, 982. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law" and makes no mention of extraterritorial jurisdiction. *Id.* In *Hellenic Lines Ltd.*, the Court extended protection under the Jones Act to a seaman who was injured on a Greek flag ship. *Hellenic Lines Ltd.*, 398 U.S. at 306. In *Steele*, the Court held a watchmaker in Mexico City, Mexico, liable for violating the Lanham Act. *Steele*, 344 U.S. at 280 (stating that the Lanham Act holds liable "'[a]ny person who shall, in commerce,' infringe a registered trade-mark" (quoting 15 U.S.C. § 1114(a))); see 15 U.S.C. § 1127. The Tariff Act provided that any person who knowingly or fraudulently imports any merchandise into the United States contrary to law shall be fined or imprisoned. See Tariff Act of September 21, 1922, § 593(b), 42 Stat. at 982; see also *Ford*, 273 U.S. at 624-25 (affirming the conviction of ship officers who violated the Tariff Act even though the Coast Guard intercepted them on the high seas).

231. See 126 CONG. REC. 4499 (1980) (statement of Rep. Holtzman). Representative Holtzman noted that the "new definition" of refugee under the Refugee Act of 1980 "eliminate[d] the geographical and ideological restrictions applicable to refugees [that were

Furthermore, Congress could have expressly provided a geographical restriction in section 243(h)(1), just as it did in two other important provisions that were amended by the Refugee Act.<sup>232</sup> Section 208(a) provides for asylum proceedings for aliens “physically present in the United States or at a land border or port of entry.”<sup>233</sup> Similarly, section 207 provides for refugee processing overseas.<sup>234</sup> In contrast, Congress did not add a territorial restriction to section 243(h)(1).<sup>235</sup> In fact, Congress deleted the geographical limitation that was previously contained in section 243(h)(1) and did not substitute any other territorial restriction.<sup>236</sup>

## 2. Peculiarities of the Court's Application of *Leng May Ma*

The Court inappropriately concluded that in amending section 243(h)(1), Congress intended to apply the provision to paroled aliens such as those in *Leng May Ma*.<sup>237</sup> The legislative history of the Refugee Act of 1980 does not indicate that Congress intended to codify *Leng May Ma* and extend section 243(h)(1) protection to parolees.<sup>238</sup> If Congress intended to extend section 243(h)(1) protection to parolees in exclusion proceedings, it could have done so in a manner that would have been substantially clearer than removing the phrase “‘within the United States’ ” from the text of the provision.<sup>239</sup> For example, Congress could

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characteristic of United States] law since 1952.” *Id.*; see also 125 CONG. REC. 35,814 (1979) (statement of Rep. Holtzman) (same); see *supra* note 21 and accompanying text (setting forth the legislative purposes of the Refugee Act of 1980).

232. See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2575 (1993) (Blackmun, J., dissenting); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (ruling that “‘where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion’ ” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

233. 8 U.S.C. § 1158(a) (1988).

234. *Id.* § 1157.

235. *Id.* § 1253(h)(1).

236. See *id.*; see also *supra* note 25 and accompanying text (describing the deletion of the phrase “‘within the United States’ ” from section 243(h)(1)).

237. See *Sale*, 113 S. Ct. at 2575 (Blackmun, J., dissenting) (criticizing the majority for relying on a case that the Court decided long before Congress enacted the 1980 amendment); see Respondents' Opposition for a Writ of Certiorari Brief at 24, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344).

238. See *Sale*, 113 S. Ct. at 2575 (Blackmun, J., dissenting) (criticizing the majority for relying on case law that Congress never mentioned in the legislative history of the amendment); see also Brief of *Amici Curiae* Members of Congress Urging Affirmance at 25, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344) [hereinafter Brief of Members of Congress] (explaining that “[t]here is simply no mention of *Leng May Ma* anywhere in the legislative record”).

239. Brief for Members of Congress, *supra* note 238, at 26 (explaining that if Congress solely intended to extend the availability of withholding of deportation to parolees in ex-

have included exclusionary proceedings in the text or mentioned them in the section's legislative history.<sup>240</sup>

Even if Congress intended to extend section 243(h)(1) protection to parolees like Leng May Ma, this protection would extend to interdicted Haitians because United States intervention prevents their legal entry into the United States.<sup>241</sup> The United States government takes custody of interdicted Haitians, as it did with Leng May Ma, before the Haitians gain legal entry into United States territory.<sup>242</sup> Thus, if the Court's construction of section 243(h)(1) is correct, interdicted Haitians would be entitled to withholding of deportation proceedings.<sup>243</sup>

*B. Sacrificing Humanitarianism for Political Expediency: The Inevitable Consequences of the Sale Decision*

By promoting the United States disparate treatment of refugees on the basis of their nationality, the Court's decision in *Sale* contravenes Congress' purpose for enacting the Refugee Act of 1980.<sup>244</sup> *Sale* is a dangerous precedent for refugees throughout the world.<sup>245</sup> The President and Congress must clarify and delineate the boundaries of the United States refugee policy to avoid discriminatory treatment of bona fide refugees<sup>246</sup> and to prevent abuse of United States refugee laws by nonrefugees.<sup>247</sup>

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clusion proceedings, "it could have achieved that result more easily and clearly than by removing the former requirement that persons be 'within the United States' ").

240. *Id.*; *Sale*, 113 S. Ct. at 2575 (Blackmun, J., dissenting) (noting that "nothing in *Leng May Ma* even remotely suggests that the *only* persons not 'within the United States' are those involved in exclusion proceedings").

241. *See* *United States v. Kavazanjian*, 623 F.2d 730, 736 (1st Cir. 1980) (holding that "entry" is not accomplished until physical presence of an alien in this country is accompanied by freedom from official restraint"); *see* Brief of Members of Congress, *supra* note 238, at 26-27. Like Leng May Ma, interdicted Haitians on United States Coast Guard cutters are under official restraint. *Id.*

242. Brief of Members of Congress, *supra* note 238, at 27.

243. *Id.*

244. *See* Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 289-94 (1993) (explaining the disparity of treatment between Cuban and Haitian refugees).

245. Telephone Interview with Demetrios Papademetriou, Director of the Immigration Policy Program of the Carnegie Endowment for International Peace (Oct. 26, 1993) [hereinafter Papademetriou Interview]; *see infra* note 267 and accompanying text (explaining that other countries waited for the outcome of the *Sale* case to redefine their own refugee policies).

246. *See* 138 CONG. REC. S13,096 (daily ed. Sept. 9, 1992) (statement of Sen. Kennedy). Senator Kennedy proposed "the International Refugee Protection Act, which would write clearly into our immigration laws that the United States cannot return persecuted refugees, regardless of where they come into U.S. custody." *Id.*

247. *See* Kirschten, *supra* note 4, at 1976 (reporting that the President wants to strengthen border patrol, improve the State Department's screening ability, "and use anti-

### 1. *Disparate Treatment on the Basis of Nationality*

Congress sought to eliminate the Attorney General's "ad hoc, discretionary, and discriminatory decision-making" method of administering United States refugee law when it enacted the Refugee Act of 1980.<sup>248</sup> Through this Act, Congress intended to eliminate "ideological, geographical or racial or ethnic biases" that permeated United States immigration policy.<sup>249</sup> Congressional hearings and reports, which disclosed the mistreatment of Haitian asylum seekers, encouraged Congress to introduce the statutory asylum provision into the Refugee Act.<sup>250</sup>

The Court's acquiescence in the President's unequal treatment of Haitians conflicts with Congress' intent in enacting the Refugee Act.<sup>251</sup> The legislative history of the Refugee Act discloses "that the executive's discriminatory policies in dealing with Haitian refugees during the 1970's constituted one of the motivating forces behind the Act."<sup>252</sup> The Ken-

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racketeering laws to prosecute smugglers of aliens and subject those convicted to stiff prison sentences and the confiscation of property").

248. Brief of Members of Congress, *supra* 238, at 20; *see supra* note 21 (explaining that by enacting the Refugee Act of 1980, Congress intended to provide a nondiscriminatory procedure for admitting refugees to the United States).

249. 126 CONG. REC. 4507 (1980) (statement of Rep. Chisholm). Representative Chisholm commented that "[r]efugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States." *Id.* at 4507-08.

250. *See id.* at 4507-08; *see also United States Refugee Programs: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980) (statement of Sen. DeConcini) (describing the discriminatory treatment of Haitians: "If you are a boat refugee from Cuba, the INS automatically considers you a refugee. If you are a boat refugee from Baby Doc's Haiti, the INS automatically considers you an illegal alien coming to the United States for economic purposes.").

251. Brief of the National Association for the Advancement of Colored People, Transafrica, and the Congressional Black Caucus as *Amici Curiae* in Support of Respondents at 7-8, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344) [hereinafter Brief of the NAACP].

252. Brief of Members of Congress, *supra* note 238, at 21; *see* 125 CONG. REC. 35,820 (1979) (statement of Rep. Chisholm). Representative Chisholm commented that:

While supporting H.R. 2816, I also wish to briefly address the tragic plight of Haitian refugees. Since 1972, 8,000 to 10,000 black men, women, and children have fled the oppressive Duvalier regime and sought political asylum in the United States. Thousands have languished in South Florida for 5, 6, and up to 7 years, uncertain of their fate, and in desperate fear of forced return to Haiti. . . .

The Haitian Government, the State Department, and INS would have us believe, these boat people are not political refugees, but rather flee to the United States for economic reasons. . . . [T]here can be no doubt that Haitians are in fact political refugees.

*Id.* Prior to the 1980 amendment, the President retained absolute discretion to deport an alien even if she qualifies under section 243(h)(1). Brief of Members of Congress, *supra* note 238, at 24; John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 848 (1982) (explaining that the executive's ideological considera-

nebunkport Order determines which migrants may enter the United States based on foreign policy and ideological considerations, thus contradicting Congress' intent to eliminate ideological standards for United States refugee policy.<sup>253</sup>

The disparity between the INS' treatment of Haitian refugees and Cuban refugees is painfully obvious.<sup>254</sup> For the past two years, the United States has hailed the Cuban refugees who found their way to Miami as heroes and rewarded them by swiftly paroling them into the country.<sup>255</sup> The United States does not treat the Haitians similarly.<sup>256</sup> United States-

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tions led to the admission of refugees from communist countries—Cuba, Vietnam, Cambodia, and the Soviet Union—and led to the denial of appeals by refugees “from brutal regimes in the Philippines, Korea, Haiti, and Iran”).

253. See Brief of American Jewish Committee, *supra* note 6, at 18. President Reagan's Interdiction Program of 1981, the predecessor of the Kennebunkport Order, justified its disparate treatment of Cubans and Haitians by asserting that a totalitarian and unfriendly government forced Cubans into exile. *Id.* According to the 1981 program, Haitians, on the other hand, *chose* to leave Haiti, whose comparatively friendly dictatorship wanted to cooperate with the United States in controlling illegal immigration. *Id.*

The Kennebunkport Order's policy promotes disparate results. Those who succeed in entering the United States illegally are afforded the right to a determination of their refugee status; while those found on the high seas who have broken no United States laws are turned back to possible persecution without a hearing. See *id.* at 18-19. This dichotomy becomes even more suspicious when one considers that the Coast Guard, at the command of the President, decides who may reach the United States borders to have her refugee claim heard. See *id.*

254. The analysis of this Note was developed prior to President Clinton's change in immigration policy in August 1994, which denies automatic asylum for Cuban migrants. The detention and parole policies of the INS reveal the “great disparities in our treatment of Cuban and Haitian refugees.” Little, *supra* note 244, at 290. Although the rate of Cuban immigration into the United States is three times that of Haitian immigration, the INS regularly paroles Cubans into the United States and frees them from detention, but does not treat the Haitians similarly. *Id.* at 291. The INS authorizes Cubans to work and grants them permanent resident status, whereas Haitians “are systematically detained and deported” and rarely granted work permits. *Id.*

255. *Id.* at 289-90. For example, in January 1993, 52 Cubans diverted a commuter flight from Cuba to Miami. *Id.* at 289. The INS released all of the Cubans as parolees within 48 hours. *Id.* Even though more than 900,000 Cubans sought asylum in the United States, the United States “never adopted a policy of interdiction, much less of unscreened returns.” Brief of American Jewish Committee, *supra* note 6, at 13. United States-Cuban immigration policy holds open the door for “potentially uncontrolled numbers of arrivals from Cuba, who are now readily granted asylum and legal protection.” *Id.*

256. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 513 (S.D. Fla. 1980), *modified*, 676 F.2d 1023 (5th Cir. 1982). In the 1970s, the INS in Florida instituted a special “Haitian Program” to address a backlog of Haitians who sought political asylum after escaping the Duvalier dictatorship in Haiti. *Id.* at 512-13. The sole aim of the program was to deport “Haitian asylum applicants as rapidly as possible.” *Id.*; see also Little, *supra* note 244, at 292 (blaming Congress' enactment of the Cuban Refugee Adjustment Act of 1966 for further intensifying this disparity in treatment).

It should be noted that under the Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1988)), Congress provides

Cuban immigration policy is "generous and humanitarian," whereas United States-Haitian immigration policy is "stringent and inhumane."<sup>257</sup> Nonetheless, the President's continued application of the Kennebunkport Order creates "a two-track asylum program—one for Haitians and another for non-Haitians."<sup>258</sup> Unlike Cuban and other non-Haitian immigration programs, the current Haitian interdiction policy decisively denies Haitian aliens the opportunity to apply for asylum.<sup>259</sup> While the Coast Guard summarily repatriates Haitian boat people to their persecutors, it continues to rescue Cubans who flee their country on shoddy boats and rafts for Florida.<sup>260</sup>

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special treatment for Cubans: lawful, permanent residence within the United States. *Id.* at 1161. The President also provides special treatment for Haitians: automatic interception and repatriation without regard to refugee claims. Brief of the NAACP, *supra* note 251, at 9. "Although the Order itself does not single out Haitians by name, [the INS] do[es] not contest that it was expressly directed at the 'Haitian problem.'" *Id.* at 9 n.3; see *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1353 (2d Cir. 1992) (noting that the day after President Bush signed the Kennebunkport Order, the White House issued a press statement disclosing that the President "issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti"), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

257. Little, *supra* note 244, at 290. In 1966, Congress enacted the Cuban Adjustment Act, which granted Cuban immigrants permanent resident status without completing the same procedural steps that the United States required immigrants from other countries to follow. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. §§ 1101(b)(5), 1255 (1988)). The United States' policy of welcoming Cubans who flee a communist country while simultaneously repelling Haitians who flee a non-communist military dictatorship makes little sense in the post-cold war era. The United States allows refugees from many other countries to enter the United States "without the kind of hysteria, harassment, demagoguery and seeming racism that has faced the Haitians." Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747, 777 (1993) (quoting 139 CONG. REC. H4010 (June 23, 1993) (statement of Rep. Meek)).

258. Brief of the NAACP, *supra* note 251, at 8; see also Little, *supra* note 244, at 290-91 (explaining that refugee and asylum policies for non-Haitians include various procedural and substantive protections).

259. See Brief of the NAACP, *supra* note 251, at 8 (asserting that "[i]f the alien is Haitian . . . the process is very different").

260. See Brief of American Jewish Committee, *supra* note 6, at 17-19 (illustrating the drastic difference in how the Coast Guard treats Haitian and Cuban boat people). In sharp contrast to Haitians, most Cuban boat people receive legal status in the United States. *Id.* at 18-19; see Motion for Leave to File Brief *Amicus Curiae* and Brief of Human Rights Watch *Amicus Curiae* in Support of Respondents at 7, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344). In-country processing of refugee claims in Haiti will not ensure that repatriated Haitians will avoid persecution. *Id.* at 11. Although the United States Consulate and the United States Embassy in Port-au-Prince processed refugee applications, many Haitians, given the slim possibility of gaining refugee status, chose not to take the risk of being observed by Haitian government agents because the Consulate and Embassy are located in exposed areas of Port-au-Prince in close proximity to Haitian government buildings. *Id.*



The United States justifies its summary repatriation of Haitian refugees by characterizing Haitians as purely economic refugees, despite overwhelming evidence to the contrary.<sup>261</sup> Poverty is not the sole explanation for the sudden flood of Haitian boat people.<sup>262</sup> The surge in Haitian immigration that occurred immediately after the 1991 military coup, which forced President Aristide into exile, suggests that reasons other than poverty motivated many of the refugees to make the treacherous journey to the United States.<sup>263</sup>

## 2. *The International Ramifications of Sale*

The *Sale* Court utilized the same patchwork of statutory construction to interpret the Protocol as it used to interpret the Refugee Act in denying humanitarian relief for refugees on the high seas.<sup>264</sup> To avoid the mandates of Article 33 of the Protocol, the Supreme Court exploited "gray areas of international law," thereby legitimizing the President's program of interdiction and repatriation.<sup>265</sup>

As a result of the *Sale* decision, the United States has lost credibility in reprimanding other governments for human rights violations.<sup>266</sup> Other countries attentively awaited the outcome of the *Sale* case so that they

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261. Malissia Lennox, Note, *Refugee, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 704 (1993); see Connie Bruck, *Springing the Haitians*, AM. LAW., Sept. 1982, at 35-39. Former INS General Counsel Maurice Inman reflected the government's attitude when he stated that "'one hundred percent' [of Haitian refugees] came for economic reasons: 'They want material wealth, whatever that may be to them—a house, a car, a pig.'" *Id.* at 39.

262. Lennox, *supra* note 261, at 705; see *supra* note 35 (setting forth noneconomic reasons for Haitians' fleeing Haiti after the military ousted President Aristide).

263. Lennox, *supra* note 261, at 705; see *supra* note 35. Some Members of Congress recognized that most Haitians interdicted on the high seas feared political persecution and deserved political asylum in the United States. Christine C. Lawrence, *Committee Votes to Suspend Repatriation of Haitians*, 1992 CONG. Q. 414, 414 (1992). The House of Representatives passed a bill to suspend the Haitian repatriation program on February 27, 1992, but the Senate took no action. 138 CONG. REC. H802-24 (daily ed. Feb. 27, 1992).

264. See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2558-67 (1993) (using the uncommon definitions of return and refouler to interpret the text of Article 33 of the Protocol and referring to negotiating histories that were never properly communicated to signatories or ratifying bodies within the Convention); see *supra* notes 199-202 and accompanying text (criticizing the Court's reliance on negotiating histories).

265. See *Sale*, 113 S. Ct. at 2568-69 (Blackmun, J., dissenting) (arguing that the Court departed from the ordinary meaning of the Protocol's language by ignoring its clear prohibition against returning a refugee to her homeland).

266. See *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 361 n.59 (1993) (explaining that the Haitian forced repatriation policy will likely "reverse the trend toward recognition of a customary international law right of *non-refoulement*"); Interview with David Williams, Special Counsel for Immigration, United States Department of Labor (Aug. 29, 1994) (explaining that the United States "does severe injustice to its role as an international leader in human rights").

could align their own refugee policies with United States policy.<sup>267</sup> *Sale* teaches the global community that a country only needs to arrange bilateral agreements with oppressive governments<sup>268</sup> to avoid the non-refoulement obligations of the Protocol.<sup>269</sup>

## V. CONCLUSION

Under section 243(h)(1) of the INA, the United States will not deport aliens who are able to prove that they are bona fide refugees. Prior to 1980, section 243(h)(1) prohibited the deportation of refugees physically and legally present within the United States. The Refugee Act of 1980 amended the INA to provide a comprehensive and uniform scheme for those fleeing persecution. Congress amended section 243(h)(1) in 1980 by deleting the phrase "within the United States."

The *Sale* majority ruled that the United States need not consider claims for asylum that are made by Haitian refugees whom the United States has intercepted on the high seas. The holding in *Sale* legitimizes the United States interdiction and repatriation of Haitian refugees, and illustrates the Court's refusal to challenge the legality of the highly volatile issue of United States immigration policy. The Court's decision in *Sale* will inevitably foster the continued discriminatory treatment of bona fide Haitian refugees. *Sale* sets a frightening precedent for the world community. Congress and the President must reassert the United States commit-

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267. Papademetriou Interview, *supra* note 245 (explaining that Australia was extremely interested in the outcome of *Sale* because "this is something they want to do" to deal with an influx of Southeast Asians who seek refuge in Australia); see *The Supreme Court, 1992 Term—Leading Cases*, *supra* note 266, at 361 (predicting that the *Sale* Court's decision "may affect the development of international refugee law for years to come"); see also Robert L. Newmark, Note, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L.Q. 833, 858 (1993) (explaining that the *Sale* decision probably will have a profound effect on international refugee law because other nations will likely turn to *Sale* "when political exigencies make it desirable for them to do so"); Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondents at 2, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) (No. 92-344) (concluding that the Court's ruling will influence "the behavior of other countries and thus the fates of untold numbers of refugees throughout the world").

268. Papademetriou Interview, *supra* note 245. Mr. Papademetriou explained that countries have and will continue to offer economic or technical aid to oppressive governments as consideration for repatriation agreements. *Id.*; see *supra* note 32 (setting forth the bilateral agreement between Haiti and the United States, which authorizes automatic repatriation of Haitians interdicted on the high seas).

269. Papademetriou Interview, *supra* note 245. The *Sale* decision and the refugee policy it sanctions are indications that "the Western World [is willing to be] less and less mindful of the legal niceties of the Protocol." *Id.*

ment to human rights by explicitly defining the boundaries of its refugee policy.

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